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2167

United States
Circuit Court of Appeals

For the Ninth Circuit.

CARNEGIE NATIONAL BANK, Successor to THE HANCHETT BOND COMPANY, a Corporation,

Appellant,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, a Corporation, HAZEL GRAHAM GLESSNER, as Executrix of the Estate of James G. Glessner, Deceased, FULTON COUNTY BANK OF McCONNELSBURG, Pa., a Corporation, and DR. LOUIS D. HYDE,

Appellees.

and

HAZEL GRAHAM GLESSNER, as Executrix of the Estate of James G. Glessner, Deceased,

Appellant,

vs.

CITY OF WOLF POINT, State of Montana, a Municipal Corporation, CARNEGIE NATIONAL BANK, Successor to THE HANCHETT BOND COMPANY, a Corporation, PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, FULTON COUNTY BANK OF McCONNELSBURG, PA., and DR. LOUIS D. HYDE,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the
United States for the District of Montana.

FILED
SEP 2 - 1939

PAUL P. O'BRIEN
GLESSNER

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the District of Montana.

No. 1583.

CARNEGIE NATIONAL BANK, Successor to the
HANCHETT BOND COMPANY, a Corpora-
tion, and MINNIE LUEBBE,

Complainants,

vs.

CITY OF WOLF POINT, State of Montana, a
Municipal Corporation; PAYNE AVENUE
STATE BANK of St. Paul, Minnesota, a cor-
poration; JAMES G. GLEASSNER; FUL-
TON COUNTY BANK of McConnellsburg, Pa.,
a corporation; and DR. LOUIS D. HYDE,

Defendants.

Be It Remembered, that on May 22, 1930, an
Amended Complaint was filed herein, which is in
the words and figures following, to wit: [2]

In the District Court of the United States for the
District of Montana, Great Falls Division.

No. 1583

THE HANCHETT BOND COMPANY, A Cor-
poration,

Complainant,

—versus—

CITY OF WOLF POINT, State of Montana, a
Municipal Corporation; D. W. SCHREIBER;
PAYNE AVENUE STATE BANK of St.
Paul, Minnesota; A Corporation; JAMES G.
GLEASSNER; FULTON COUNTY BANK
of McConnellsburg, Pa., A Corporation; and
DR. LOUIS D. HYDE,

Defendants.

AMENDED COMPLAINT

To The Honorable Charles N. Pray, Judge of the
District Court of the United States, for the
District of Montana, Sitting in Equity:

The Complainant brings this its amended com-
plaint against hereinafter named Defendants and
respectfully shows unto this Honorable court as
follows:

1.

That the Complainant, The Hanchett Bond Com-
pany, is now and at all of the times hereinafter men-
tioned, has been, a corporation, duly organized, cre-
ated and existing under and by virtue of the laws
of the State of New Jersey, with its principal place

of business at 39 South LaSalle Street, Chicago, Illinois; and is not a resident of the State of Montana.

2.

That the Defendant, the City of Wolf Point, State of Montana, is an incorporated City of and located in the State of Montana, being a Municipal subdivision of the said State, and all other defendants hereinafter named are located in and residents of the several places respectively named.

3.

That the controversy in this suit is between citizens of different states, and that the matter and amount in dispute in [3] this cause exceeds the sum or value of Three Thousand Dollars (\$3000.00) exclusive of interest and costs as will more fully appear by the allegations herein contained.

4.

That on or about to-wit: the 10th day of March, A. D. 1919, the said City of Wolf Point, Montana, a corporation, by and through its Council, passed and approved a Resolution finally ratifying and confirming the issuance of Bonds on account of and issued for the purpose of paying the cost of making special improvements and constructing sewer mains within and designated and described as Special Improvement District No. 12, in the sum of \$37,966.53, bearing interest at the rate of six per cent per annum, a copy of which said Resolution is hereto

attached and by this reference made a part hereof and marked "Exhibit 1."

5.

That said bonds were issued by the said City of Wolf Point, Montana, a corporation numbered one to seventy-five inclusive and for the sum of \$500.00 each, and were dated and delivered as follows, to-wit:

Bonds numbered 1 to 25 inclusive, dated October 9th, 1918;

Bonds numbered 26 to 54 inclusive, dated November 20, 1918;

Bonds numbered 55 to 85 inclusive, dated May 26, 1919,

that all of the said bonds matured on the first day of January, A. D. 1929, and that said bonds are identical in amount and date of maturity and are in the form indicated by Exhibit 2 attached hereto and made a part hereof, and that one bond for the sum of \$466.53 was issued and paid forthwith by the said City of Wolf Point.

6

That all of the said bonds numbered from one to seventy-five inclusive were to be paid in their numerical order and callable for payment when there were funds on hand for the payment of the same, and that all of said bonds have been paid, excepting, however, bonds numbered 42 to 75 inclu-

sive, amounting to the total sum of \$17,000.00, [4] which said bonds have matured and have become due and payable and now remain unpaid as to the full amount of the face value thereof, together with eight per cent. interest per annum thereon from the date of maturity, to-wit: January 1st, 1929, until fully paid; that certain of said bonds to-wit: numbered 42 to 49 inclusive, have heretofore been called for payment by said City on to-wit: May 24th, 1929; that certain of said bonds to-wit: numbered 50 to 52 inclusive, have heretofore been called for payment by said City on to-wit: July 13th, 1929; that certain of said bonds, to-wit: number 53 has heretofore been called for payment by said City on to-wit: January 18th, 1930, after the maturity thereof, but said City then refused to pay said bonds in full including interest on said bonds accruing.

7

That for the purpose of paying said bonds and the cost of said improvement, the City Council of the City of Wolf Point, Montana, by said resolution of March 10th, 1919, levied and assessed a special tax in the sum of \$37,966.53 against all the property lying within the boundaries of said district therein and thereby declared to be specially benefitted by said improvements, the several lots, pieces and parcels of land described in said resolution being assessed the sums therein and thereby fixed and determined; that said assessment and the

sum so levied and assessed against each lot, piece and parcel of land was made payable in ten equal installments, with interest at the rate of 6% per annum from the date of said resolution until paid; and that by said resolution said assessments and the installments thereof with interest were declared to be an assessment fund, which was thereby irrevocably pledged to and for the payment of the above described bonds; all of which will more fully appear from the terms and provisions of said resolution, copy of which is hereto attached and by reference made a part hereof. [5]

8

That in accordance with the provisions of law the first installment of the assessment became due and payable during the month of November, 1919, and said installment was in fact put into collection by the said City of Wolf Point, through the County Treasurer of the County of Roosevelt, State of Montana; that the second and succeeding installments of the assessments became due and payable in the month of November in each of the years 1919 to November 30th, 1928, inclusive, and said several installments of the assessment were in fact similarly put into collection by the City in each of said several years last aforesaid; that in each of said several years the said City Treasurer of the said City of Wolf Point by and through the said County Treasurer of the County of Roosevelt, State of Montana, has received payment of portions of

said assessment and the several installments of the assessment thereof with interest from the owners of the property, as levied and assessed and such funds have come into the possession of said City; that from time to time there has been certified delinquent certain lots, pieces and parcels of land assessed as aforesaid, the said installments of the assessment whereof were not paid as required by law; that the said County Treasurer did from time to time collect certain of said assessments thereof that had become delinquent and paid the same to the said City Treasurer of the said City of Wolf Point; but your Complainant is informed and believes and so states the fact to be that some portion of said assessment thereof have not been collected either by the said City Treasurer or by the said County Treasurer, and still remain unpaid. [6]

9

That from time to time there has come into the hands of the said City of Wolf Point and of the said City Treasurer from the said County Treasurer, from collections made by them as aforesaid, large sums of money, the exact amount of which your *complaint* is unable to ascertain and determine; nor is your complainant able by an examination of the records of said City to determine how much of said moneys so collected or how much of the principal and interest as to each of the several installments of the assessment of Special Improvement District No. 12, have come into the hands of the said City Treasurer, of said City; but

your complainant states on its information and belief that there has been paid by the owners of property assessed as aforesaid for said improvements on account of the bonds issued and delivered on Special Improvement District No. 12, the sum of approximately to-wit: \$43069.93, including principal and interest, but the exact amount thereof and the amount received by the said City on the annual installments thereof and the amount received as interest, as well as the times when said owners of property have paid one or more of the said installments, your complainant is unable to fully ascertain and determine; all of which funds your complainant states should have been received, held and used by the City of Wolf Point, and its Treasurer for the purposes of said Improvement District No. 12 and the payment of said bonds and interest thereon.

10

That the said City of Wolf Point and its officers and agents in such behalf, particularly the City Treasurer by and through the County Treasurer, are charged by law with the duty [7] of collecting the assessments of said Special Improvement District No. 12, and the said City and the City Treasurer are charged by law with the duty of distributing and paying out such assessment fund of and from said Special Improvement District No. 12; and said City and the Treasurer thereof are trustees of such assessment fund for the use and benefit of the owners and holders of the

said bonds and the interest coupons therefrom, and as such trustees are charged with the duty to collect, hold and pay out all of such funds in manner required by law, and to pay the funds collected from each of the several annual installments of Special Improvement District No. 12, together with the interest collected therewith, upon the bonds and interest coupons respectively issued against and payable out of the several annual installments in each of the several years as and when such bonds and coupons were callable and for which such assessments thereof were assessed, levied and collected.

11

That it became and was the duty of said City of Wolf Point and its said officials to pay out the funds, which from time to time should be collected by it from the several annual installments of Special Improvement District No. 12, by calling the bonds issued against the said District; but your complainant says that although there has been collected and come into the hands of such City and its officials the gross sum of approximately to-wit: \$43069.93, applicable to the payment of said bonds and interest coupons, nevertheless said City and its Treasurer have paid out and diverted certain

of said funds belonging to said District for other purposes, among them being as follows, to-wit: [8]

October 31, 1921, paid on auditing expense	\$100.00;
November 30, 1921, transferred by Ordinance #100 to the contingency fund	\$522.55;
January, 1922, credited to Special Improvement District No. 10.....	\$300.00;
April 30, 1922, transferred funds to suspense, water and general funds of said city	\$962.89;

and your complainant upon its information and belief now charges and avers the facts to be that the said City has not repaid the said funds so paid out and diverted together with interest thereon from the times of such diversion to the said Special Improvement District No. 12, and that other funds and money so collected for said District have been misappropriated and misapplied to purposes and in a manner to your complainant unknown without repayments thereof, which said funds and money so collected were properly payable only upon the bonds and interest coupons issued against said District, and that the total amount of the bonds and interest coupons therefrom in fact paid by said City and the City Treasurer is substantially less than the total amount of said assessment with interest which has been collected.

12

That your complainant further alleges upon its information and belief, and so states the facts to be, that the said City and its said officials have collected large sums of money belonging to the said District and have held the same for long periods of time, failing and neglecting to call bonds pursuant to the Statutes of the State of Montana in cases made and provided, thereby allowing and permitting interest to accumulate on said callable bonds; and from time to time such accumulated funds have been used to pay interest coupons which would not have matured if bonds had been called as required by law; which failure, negligence and misapplication of funds of and by the said City and its officials and agents did deplete and reduce the total gross assessment fund of said District applicable [9] only and irrevocably pledged to the payment of the said bonds.

13

That certain installments of the assessment of said District as against particular pieces or parcels of land assessed for said District, have not been paid when due, so that the gross amount of the assessment so levied as hereinbefore set forth has not been collected and received by the said City, its officers and agents; and your complainant alleges that the said City, its officers and agents have failed, neglected and refused by proper action

upon such default in payment of certain installments to declare said delinquent installments together with the remaining installments of assessment of said District against those certain pieces or parcels of land so delinquent immediately due and payable in manner as required by law, but have permitted the special assessments and the general taxes levied and assessed against said pieces or parcels of land to accumulate for a long period of time; and that the said lands have been sold at tax sales from year to year and the title thereto vested in the County of Roosevelt, State of Montana, and all of the right, title and interest in and to the said lands by virtue of the assessment of the said District has been forever lost as security for the payment of the said bonds; and that the said City has further failed, neglected and refused to perform its duty by taking any action in the premises whatsoever so that the bonds set forth and described in paragraph 6 hereof have remained unpaid for many years last past.

14

That said City in levying and assessing the sum of \$37,966.53, being an amount exactly the same as the amount of bonds issued, failed to make any provision for interest which had accumulated upon the said bonds from the date thereof to the date of the resolution levying said assessment from which date interest accrued [10] on the assessment;

and said City also failed to make any provision for the interest from time to time accruing, upon bonds subject to call by reason of collection of the several installments of the assessments and portions thereof, during the period between the time of payment of assessments by the respective owners of property and the time when such bonds were in fact called and paid; that the assessment so levied in the amount of \$37,966.53 and the interest thereon was inadequate and insufficient to pay all of the bonds so provided as aforesaid to be issued with interest thereon; but said City and the City Treasurer nevertheless paid in full the interest coupons first maturing representing interest from the date of said bonds, and have also paid in full all other interest coupons from time to time maturing and have paid the bonds heretofore called for payment in full with interest to the date of call and payment, and by reason of such payments said assessment fund has been depleted and reduced so that said city has been unable to pay a large number of bonds and has not paid bonds in the same proportion to the total amount of bonds issued, which the amount of the assessment heretofore in fact collected bears to the total assessment levied and assessed; by means whereof and by reason of the failure of said City and the City Treasurer in the performance of the duty owed by them as trustees for and in behalf of the owners and holders of said bonds, the complainant herein has been prevented from collecting and receiving payment of its said bonds.

15

That, as this complainant is informed and believes, the respective installments due and payable from certain lots, pieces and parcels of land in the several years from November 1919 to November 1928 inclusive were not paid when due, and have not been paid from thence hitherto, but such lots, pieces and parcels of land have continued in default and from year to year have been sold at tax [11] sale and title thereto vested in the County of Roosevelt of the State of Montana; and said City has been put on notice of such facts by reason of not receiving the full amount of the installments with interest from time to time due and payable; that said City has levied other assessments in large amounts upon the same lots, pieces and parcels of land assessed for special Improvement District No. 12 and certain of which lots, pieces and parcels of land have likewise defaulted payment of such other assessments and installments thereof and have likewise defaulted payment of such other assessments and installments thereof and have defaulted payment of the general taxes levied and assessed thereon; and that the total amounts so levied and assessed, and which have become due and payable from such lots, pieces and parcels of land have far exceeded the value thereof so that the County of Roosevelt of the State of Montana has been unable to sell such lands for an amount equal to or ap-

proaching such accumulated taxes and assessments; that the action of said City in continuing the levying of assessments beyond the value of the respective lots, pieces and parcels of land constitutes a breach of the duty which said City owed as a trustee for and in behalf of the owners and holders of the bonds of Special Improvement District #12, and said City having had and received the benefit of said improvements should now be compelled to make restitution on account of such breach of duty to the extent that complainant and other holders of bonds have been damaged thereby.

16

That the said City and City Treasurer have further failed in their duty as trustees as aforesaid in that, with knowledge of the fact that all assessments were not being collected for the reasons aforesaid, so that all bonds could not be paid out [12] of the assessment fund, they nevertheless failed to apportion, divide and make payment of the assessment fund from time to time collected and received by equitable distribution among and on account of the several bonds outstanding and unpaid, but on the contrary said City and the City Treasurer continued to pay interest coupons in full and to call and pay bonds of the lowest number to the prejudice of complainant and other holders of bonds of higher number.

17

That complainant herein is now the owner of certain of said bonds above described to-wit: Bonds numbered 45 to 58 inclusive and number 75 of the aggregate face value of \$7,500.00, which bonds are now past due and unpaid and which amount has been due and owing to the complainant herein since to-wit: January 1, 1929, with interest from that date in accordance with the law of Montana at the rate of 8% per annum; and that all of said bonds so owned by the complainant herein (except perhaps bond #75) might and should have been called and paid on or before the date of the maturity thereof except that said City and the City Treasurer thereof have failed, neglected and refused to perform their duties as trustees by collecting, and in due course from time to time keeping said assessment fund intact and available to the payment of said bonds, and calling and paying said bonds in accordance with the requirements of the law of Montana;

18

That complainant further states that the remainder of said bonds not so owned and held by complainant are numbered and owned, as your complainant is informed and believes, by the following

named persons, all of whom are now made parties defendant hereto, namely: [13]

	Bonds Numbered,
A. W. Schreiber, Carnegie,	
Pennsylvania	42, 43, and 44;
Payne Avenue State Bank,	
St. Paul, Minn.	59, to 66 Incl.
James G. Gleassner, York,	
Pennsylvania	67 and 74,
Fulton County Bank, McCon-	
nelsburg, Pa.	68 to 72 incl.
Dr. Louis D. Hyde, Owedo,	
New York	73.

that all of said persons have and claim some right, title and interest in and to said assessment fund created and established for the payment of all of the bonds of said Special Improvement District No. 12, and that the interest of said persons should now be determined and established as a part of the equitable administration of such trust funds.

19

That the said City of Wolf Point, Montana, in making said assessment for the purpose of paying such bonds and in levying and assessing the several amounts and the installments thereof against the several lots, pieces and parcels of land benefited by said improvement and by irrevocably pledging such assessment fund created thereby, did thereby become a trustee of such assessment fund for the

equal and proportionate benefit of all holders of such bonds issued as aforesaid, with all the duties and obligations applicable under established principles of equity to any person receiving, holding and administering trust funds; and said City should now be required to make a full, true and just accounting of all moneys received and disbursed on account of the assessments of Special Improvement District No. 12; and said City should be required to pay all moneys which may be found due and owing from said City upon such accounting to the persons who may have an interest in and who may be equitably entitled under the law to any part of such trust funds, or unto said assessment fund for [14] the benefit of the holders of bonds of said Special Improvement District No. 12; and said City should be required to do and perform all of those acts for the proper protection of the holders of such bonds which may be required by, under and pursuant to the laws applicable thereto, or by their duty and obligation of a Trustee to the beneficiaries of such trust.

20

That said City has failed in its duties and obligation as a trustee and by reason thereof and by reason, among other things, of the misapplication and diversion of funds, the preference of some bondholders over others, the failure to prorate the assessment fund and to pay interest coupons with interest money, and to pay bonds with the principal

of said assessment, said City of Wolf Point has become and is directly and generally liable to the complainant herein as a beneficiary of such trust funds for the use and benefit of all parties in interest therein.

For as much, therefore, as your complainant is without adequate remedy in the premises except in a court of equity, therefore your complainant prays:

(1) That a subpoena may issue out of this Honorable Court directed to the defendants, the City of Wolf Point, a municipal corporation, D. W. Schreiber, Payne Avenue State Bank, James G. Gleassner, Fulton County Bank, and Dr. Louis D. Hyde, requiring and commanding them and each of them to appear in this cause upon a day certain and to answer the several allegations in this Bill of Complaint contained, but not under oath, answer under oath being hereby expressly waived.

[15]

(2) That a full, true and just accounting may be made of all the moneys collected and received by and in behalf of said City of Wolf Point of and from the special assessment levied for special Improvement District No. 12, and of the disbursements therefrom and of the proportionate and respective amounts based upon collections applicable to the bonds respectively issued against said assessments.

(3) That the defendant, City of Wolf Point may be decreed to pay to your Complainant what,

if anything, upon the taking of such account shall appear to be due to complainant upon the bonds held by Complainant issued against said Special Improvement District No. 12 or in the alternative that said City of Wolf Point be decreed to reimburse and pay into the assessment fund created for said Special Improvement District No. 12 whatever amount shall appear to be due and owing thereto, for the use and benefit of all parties in interest therein.

(4) That the rights of this Complainant and of the several defendants owning bonds of said Special Improvement District No. 12 in and to said assessment fund out of which said bonds are payable may be determined and payments directed to be made to this Complainant and said defendants as equity may require.

(5) That the said City of Wolf Point may and shall be required by the mandate and order of this court to make payment of any amount which shall be found to be due either to your Complainant or to the assessment fund of Special Improvement District No. 12, for the use and benefit of all parties in interest therein, by the appropriation of funds and levy of taxes for such purpose and the passage or taking of any and all necessary ordinances and proceedings from time to time required to that end; and that said [16] City may be further required by the mandate and order of this Court to collect, receive and hold all moneys and

fund appropriated, levied and collected for the purpose of paying the amount which may be found due to your Complainant or to said assessment fund and to pay such funds in accordance with the judgment and decree of this court.

(6) That the said City of Wolf Point shall likewise be required by the mandate and order of this Court to receive and hold any funds which may be hereafter collected as the proceeds of the assessments upon property for said Special Improvement District No. 12 and to pay such funds to your Complainant as its interest therein may appear or into said assessment fund of Special Improvement District No. 12 for the use and benefit of all parties in interest therein.

(7) That the City of Wolf Point may be required to do and perform all of those acts required by law and by their duty as trustees for the use and benefit of the several parties in interest.

(8) And that your Complainant may have such other and further relief in the premises as equity may require and to this Honorable Court shall seem meet.

And your Complainant will ever pray.

MARRON & FOOR,

By ARLIE M. FOOR,

Its Solicitors.

[Endorsed]: Filed May 22, 1930. [17]

Thereafter, on September 2, 1930, Separate Answer of defendant City of Wolf Point, Montana, was filed herein, which is in the words and figures following, to-wit: [18]

[Title of District Court and Cause.]

SEPARATE ANSWER OF DEFENDANT,
CITY OF WOLF POINT.

Comes now the above named defendant, City of Wolf Point, State of Montana, and for its separate answer to the amended complaint of plaintiff on file herein admits, denies and alleges as follows:

I.

Admits the allegations set forth and contained in paragraph I of said amended complaint.

II.

Admits the allegations set forth and contained in paragraph II of said amended complaint.

III.

Admits the allegations set forth and contained in paragraph III of said amended complaint.

IV.

Admits the allegations set forth and contained in paragraph IV of said amended complaint. [19]

V.

Admits the allegations set forth and contained in paragraph V of said amended complaint.

VI.

Denies that all of said bonds, numbered from 1 to 75 inclusive were to be paid in their numerical order and alleges that said bonds were and are payable in the order of their registration; admits that said bonds were callable for payment when there were funds on hand for the payment of the same, and that all of said bonds have been paid except bonds numbered 42 to 75 inclusive, amounting to a total of \$17,000.00, which said bonds have matured; admits that on May 24th, 1929, bonds numbered 42 to 49 were called for payment by said City; that on July 13th, 1929, bonds 50 and 52 were called for payment; that on January 18th, 1930, bond 53 was called for payment. Specifically denies each and every other matter, fact and thing alleged and contained in said paragraph.

VII.

Admits the allegations set forth and contained in paragraph VII of said amended complaint.

VIII.

Admits the allegations set forth and contained in paragraph VII of said amended complaint. Further answering said paragraph defendant alleges that during the years 1919 to 1928 inclusive, installment assessments made under said resolution became delinquent and that by reason of said delinquency defendant has been unable and is now unable to collect installment assessments upon the

property included in said District amounting to the sum of \$7890.08 with interest and penalties as more fully appears from Exhibit "A", attached hereto and by this reference made a part hereof.

IX.

Admits that there has come into the hands of the [20] said City of Wolf Point and of the City Treasurer from collections made upon installments assessments upon the property in said District the sum of \$48,873.15, including principal, interest and penalties, all of which funds have been and are held by the City of Wolf Point and its Treasurer for the purposes of said Improvement District No. 12 and the payment of said bonds and interest thereon. Specifically denies each and every other matter, fact and thing alleged and contained in said paragraph.

X.

Admits that the City Treasurer is charged by law with the duty of collecting the assessments of said special Improvement District No. 12 by and through the County Treasurer; and with the duty of distributing and paying out such assessment fund of and from said special Improvement District No. 12; admits that said City Treasurer is charged with the duty to collect, hold and pay out all of such funds in the manner required by law, and to pay the funds collected from each of the several annual installments of special Improvement District No. 12, together with interest collected therewith

upon the bonds for which such assessments were assessed, levied and collected. Specifically denies each and every other matter, fact and thing alleged and contained in said paragraph.

XI.

Admits that it was the duty of the City Treasurer of Wolf Point, Montana, to pay out the funds which from time to time should be collected by it from the several annual installments of Special Improvement District No. 12 by calling the bonds issued against said District; admits that there has been collected and come into the hands of the City Treasurer the sum of \$48,873.15 applicable to the payment of said bonds and interest; denies that said City or its Treasurer have paid out or diverted certain or any of said funds belonging to said District for [21] other purposes or for the purposes set forth in said paragraph or otherwise or at all; denies that the City Treasurer and said City have not repaid to said Special Improvement District No. 12 any and all funds paid out or diverted; denies that any sum or sums or funds or money collected for said District other than as specifically set forth in said paragraph have been misappropriated or diverted, without repayments thereof, or otherwise or at all; admits that the total amount of the bonds and interest coupons paid by the City Treasurer is less than the total amount of said assessment with interest which has been collected; alleges that there has been collected the sum of

\$48,873.15; that there has been paid out upon the principal and interest of said bonds the sum of \$42,199.81 and that there is a balance on hand applicable to the payment of said bonds and interest the sum of \$6,273.34.

XII.

Denies that said City or its officials have collected large or any sums of money belonging to said District and have held the same for long or any periods of time, or have failed or neglected to call bonds pursuant to the Statutes of the State of Montana or otherwise, or have allowed or permitted interest to accumulate on callable bonds; denies that accumulated or other funds have been used to pay interest coupons which would not have matured if bonds had been called as required by law, or otherwise; denies that said City or its officials or agents failed, neglected or misapplied any funds of said District so that the gross assessment fund of said District was depleted or reduced or otherwise.

XIII.

Admits that installments of the assessment of said District as against particular pieces and parcels of land included in said District have not been paid when due; alleges [22] that the correct amount of such delinquent and unpaid taxes is shown upon Exhibit "A" to this answer; denies that defendant or its officers or agents have failed or neglected or

refused by proper or other action upon such default in payment of certain installments to declare said delinquent installments together with the remaining installments of assessment of said District against those certain pieces or parcels of land so delinquent immediately due and payable as required by law or otherwise; denies that defendant or its officials or agents have permitted said special assessments and the general taxes levied and assessed against said pieces of land to accumulate for a long or any period of time; admits that various pieces of land included in said District have been sold at tax sales and the title thereto vested in Roosevelt County, Montana, and all right, title and interest in and to said lands forever lost as security for the payment of said bonds. Specifically denies each and every other matter, fact and thing alleged and contained in paragraph 13.

XIV.

Denies that defendant in levying or assessing the sum of \$37,966.53, failed to make any provision for interest which had accumulated upon the said bonds from the date thereof to the date of the resolution levying said assessment or otherwise; denies that defendant failed to make any provision for the interest from time to time accruing, upon bonds subject to call by reason of collection of the several installments of the assessments and portions thereof or otherwise, during the period between the time of payment of assessments by the

respective owners of property and the time when such bonds were in fact called and paid, or otherwise; denies that the assessment levied by said City was inadequate or insufficient to pay all of the bonds so provided to be issued with interest; admits that the City Treasurer paid in full the interest coupons first maturing [23] representing interest from the date of said bonds, and has also paid in full all other interest coupons from time to time maturing and has paid the bonds heretofore called for payment in full with interest to the date of call and payment; denies that by reason of such payments said assessment fund has been depleted or reduced so that defendant has been unable to pay a large number of bonds or otherwise; denies that defendant has not paid bonds in the same proportion to the total amount of bonds issued which the amount of the assessment heretofore in fact collected bears to the total assessment levied and assessed by means whereof or otherwise or by reason of any failure on the part of defendant or the City Treasurer in the performance of any duty owed by them as trustees or otherwise for or in behalf of the owners or holders of said bonds, or otherwise, complainant has been prevented from collecting or receiving payment of its said bonds.

XV.

Denies that the total amounts levied and assessed against the lands included in said District have exceeded the value thereof so that the County of

Roosevelt has been unable to sell such lands for an amount equal to or approaching such accumulated taxes and assessments or otherwise; denies that the action of said City in continuing the levying of assessments beyond the value of the respective lots, pieces and parcels of land constitutes a breach of any duty owing by it as trustee or otherwise for and in behalf of the owners and holders of the bonds of Special Improvement District No. 12; denies that said City for any reason whatsoever should be compelled to make restitution on account of any breach of duty or otherwise to any extent whatsoever. Admits each and every other allegation set forth and contained in paragraph 15. [24]

XVI.

Denies that said City or said City Treasurer have failed in their duty as trustees or otherwise in that with knowledge or otherwise, of the fact that all assessments were not being collected for the reasons set forth in said bill or otherwise, so that all bonds could not be paid out of the assessment fund or otherwise, they failed to apportion, or divide or make payment of the assessment fund from time to time collected and received by equitable distribution or otherwise, among or on account of the several bonds outstanding or unpaid, or otherwise; admits that said City Treasurer continued to pay interest coupons in full and to call and pay bonds of the lowest number. Denies each and every other

matter, fact and thing alleged and contained in said paragraph.

XVII.

Denies that it has any knowledge or information as to whether complainant is now the owner of bonds numbered 45 to 58 inclusive and number 75. Admits that said bonds are past due and unpaid; denies that all or any of said bonds might or should have been called or paid on or before the maturity thereof; denies that such non-payment was by reason of any failure, neglect or refusal on the part of defendant or said City Treasurer to perform their or either of their duties as trustees as set forth in said paragraph or otherwise or at all.

XVIII.

Denies that it has any knowledge or information as to the matters set forth and contained in paragraph 18 and therefore denies the same.

XIX.

Denies that said defendant, in making said assessment for the purpose of paying such bonds, or otherwise, or in levying or assessing the several amounts or the installments thereof [25] against the several lots, pieces and parcels of land benefited by said improvement, or by irrevocably pledging such assessment fund created thereby, or otherwise or at all did thereby or otherwise become a trustee of such assessment fund for the equal or proportionate benefit of all or any holders of such

bonds issued as aforesaid, or otherwise; denies that by reason of the facts alleged or otherwise defendant became charged with all or any of the duties or obligations applicable under the established or other principles of equity, to any person receiving, holding or administering trust funds or otherwise; denies that any accounting whatsoever is required of the moneys received or disbursed on account of the assessments of Special Improvement District No. 12; denies each and every other matter, fact and thing alleged in said paragraph 19.

XX.

Denies that defendant has misapplied or diverted said or any funds to which complainant is entitled or otherwise; denies that by reason of any matters alleged in paragraph 20, or otherwise or at all, defendant is liable to complainant as a beneficiary of trust funds or otherwise or at all.

Wherefore, having fully answered the complaint of plaintiff on file herein defendant prays that complainant take nothing by its complaint and that defendant be dismissed hence with its costs.

FRANK M. CATLIN

Wolf Point, Montana.

GEORGE E. HURD

H. C. HALL

E. J. McCABE

Great Falls, Montana.

Solicitors for Defendant,

City of Wolf Point. [26]

The defendant, City of Wolf Point, consents that service of papers herein may be made upon the firm of Hurd, Hall & McCabe, Great Falls, Montana.

FRANK M. CATLIN

GEORGE E. HURD

H. C. HALL

E. J. McCABE

Solicitors for Defendant.

[Endorsed]: Filed Sept. 2, 1930. [27]

Thereafter, on November 17, 1930, Order referring cause to Special Master, was duly filed and entered, being in the words and figures following, to-wit: [28]

[Title of District Court and Cause.]

ORDER

This cause now coming on to be heard on written motion of the Complainant herein for a reference of this cause to a Master in Chancery, and the Court having examined said motion and also the Bill of Complaint and Answer thereto, and now being fully advised in the premises:

Therefore, it is ordered that this cause be and the same is hereby referred to G. G. Harris, of Great Falls, Montana, an Attorney of this Court, as a Special Master in Chancery, who shall fix a time or times and place in the City of Wolf Point,

Montana, at which he shall hear and receive the evidence of all parties hereto offered in support of the Bill of Complaint and Answers thereto; and he shall cause to be brought before him all witnesses and records by subpoena as required by any of the parties hereto; and he shall cause the testimony of the witnesses to be reduced to writing, which with all documentary evidence, shall be set forth in a complete transcript of all of the evidence; and said Master shall thereupon return his report upon such evidence, together with his recommendations upon the law and the facts, to this Court within a reasonable time hereafter.

Dated this 17th day of November, A. D. 1930.

CHAS. N. PRAY,

Judge.

[Endorsed]: Filed and Ent. Nov. 17, 1930.

[29]

Thereafter, on November 17, 1930, Order for Service on absent defendants was duly filed and entered herein, being in the words and figures following, to-wit: [30]

[Title of District Court and Cause.]

ORDER

This cause now coming on to be heard upon the Petition of the complainant herein, and the court having examined said Petition and the Bill of Com-

plaint herein, and having heard the arguments of counsel and being now fully advised in the premises:

Therefore, it is now found and determined by the court that the complainant herein by the allegations of its Bill of Complaint seeks an accounting of, and a determination of the rights and obligations of the complainant and certain defendants as beneficiaries in and to, a certain trust fund and trust property consisting of assessments levied upon certain lands within the said City of Wolf Point, a defendant herein, and the proceeds therefrom and the lien of said assessments upon and against said lands; and it appears from said Bill of Complaint that the suit is brought by the complainant to enforce an alleged legal and equitable lien upon or claim to real and personal property within the Montana District of the United States District Court, consisting of the said assessments and the proceeds therefrom and the lien thereof upon and against said lands; that it further appears from said Bill of Complaint that certain persons made defendants thereto are also [31] the owners of certain bonds and beneficially interested with complainant in said assessments, proceeds, and lien; that all said parties are necessary and proper parties hereto.

Therefore, it is ordered that the said defendants A. W. Schreiber, Payne Avenue State Bank, James G. Gleassner, Fulton County Bank and Dr. Louis

D. Hyde shall appear, plead, answer or demur to the Bill of Complaint herein on or before the seventh day of January, A. D. 1931.

And it is further ordered that unless said defendants voluntarily appear herein, then the Clerk of this court shall issue a subpoena directed to the Marshals of the districts in which said several defendants reside and such subpoenas together with a certified copy of this order shall be sent to such Marshals with directions to serve the same upon said defendants not less than twenty (20) days prior to the said seventh day of January, A. D. 1931 and to make return thereon on or before said date.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed and Entered Nov. 17, 1930.

[32]

Thereafter, on January 12, 1931,
ANSWER OF DEFENDANTS PAYNE AVENUE STATE BANK, ET AL,

was duly filed herein, being in the words and figures following, to-wit: [33]

[Title of District Court and Cause.]

Now come Payne Avenue State Bank, James C. Gleassner, Fulton County Bank and Dr. Louis D. Hyde, as defendants to the Amended Bill of Com-

plaint herein and make this their joint and several answers thereto as follows:

These defendants now expressly say that they are respectively residents and citizens of the cities and states indicated after their names, and that they are respectively the owners and holders of those bonds of the City of Wolf Point issued for Special Assessment District #12 more particularly described in the Amended Bill of Complaint as follows:

Name	Bond Numbers
Payne Avenue State Bank, St. Paul, Minn.	59 to 66 Incl.
James G. Gleassner, York, Pennsylvania	67 and 74
Fulton County Bank, McCon- nelsburg, Pa.	68 to 72 Incl.
Dr. Louis D. Hyde, Owedo, New York	73

and these defendants now seek the aid and protection of this Court of Equity in these proceedings as beneficiaries of the trust fund and property herein sought to be administered and of which an accounting is sought.

These defendants answering the amended bill of complaint and all paragraphs thereof now admit each and all the several allegations of fact and law contained therein and in each and all the several paragraphs thereof, [34] with the exceptions and distinctions hereinafter specifically set forth,

and now join in the prayer for relief as equity may require;

These defendants further answering say that they deny that it became and was the duty of the City of Wolf Point and of the Treasurer thereof to call and pay in full any bonds out of the assessment fund from and after the time when any installment of the assessment was not paid in full; and these defendants say that the first installment of said assessment and likewise the second and succeeding installments, together with interest payable therewith, as to certain lots, pieces and parcels of land were not paid when due and have not since been paid, and the City of Wolf Point was thereupon and thereby placed on notice that the full amount of said assessment fund and of the respective installments were not in fact being collected and that the full amount of bonds as to each installment could not be paid so long as such shortage continued, and thereupon it became and was the duty of said City and the Treasurer thereof as Trustees for and in behalf of the holders of all bonds to hold, distribute and pay out the assessment fund for the equal and proportionate benefit of all such holders without preference or priority of one bond over any other bonds of the respective installments;

These defendants further answering say that the total assessment levied and the several portions thereof as against the several lots, pieces and parcels of land were in a fixed and definite amount aggregating \$37,066.53, against which bonds to the

same amount were issued, and that the proceeds therefrom constituted a fund solely applicable to payment of the principal amount of said bonds; that said assessment and the portion thereof from each lot, piece and parcel of land bore interest payable annually and such interest constituted a fund when collected applicable solely to payment of the interest coupons attached to said bonds; that it became and was the duty of said City and its Treasurer to keep each of said funds for principal and for interest separate and apart without commingling for any purpose and to hold, distribute and pay out such funds equally among the holders of the respective bonds and coupons; but these defendants say that said City and its Treasurer in disregard of their said duty did in fact use a part of such principal fund in [35] payment of interest coupons, and has paid all interest coupons in full and certain bonds in full when the respective funds applicable to said bonds and coupons were insufficient by reason of defaults in payment of assessments to permit of such payments, and said payments constitute a diversion and misapplication of trust funds to the damage of these defendants.

These defendants further answering deny that the bonds of complainant or any of them, or any other bonds, might and should have been called and paid on or before the date of the maturity thereof, or at any time, but these defendants say that all bonds and the interest coupons therefrom should be paid only in the proportion which the

amount of the several installments of the assessment actually collected bears to the whole of the respective installment of said assessment as levied; and these defendants further say that the provisions of the Montana Statutes relating to the levy of assessments provide for the division and collection thereof in equal annual installments, and such provisions are to be read and construed in conjunction with those further provisions relating to payment of bonds and interest coupons; that the assessment herein involved was payable in ten equal installments, that bonds were issued in exactly the amount of the assessment, and said bonds accordingly were issued against and payable out of the respective installments; that those provisions of the statutes providing for the call of bonds for payment relate to and are to be construed only as a fixing of the time for payment and not as creating or establishing a priority of one bond over any other bond except only to the extent that the funds collected as one installment of the assessment are then proportionately applicable to the bonds payable from such installment when called for payment;

These defendants further answering deny that the lien of said assessments and all right, title and interest in and to the lands assessed, has been lost as security for the payment of said bonds by reason of the County of Roosevelt taking title of said lands; but these defendants say that said assessments were duly levied in accordance with the provisions of law for the purpose of providing

for the payment of said bonds and thereupon became liens upon and against the lands assessed in favor of the City of [36] Wolf Point as a trustee for the use and benefit of all bonds and the holders thereof; that such assessments and the lien thereof constitute property held by the City as Trustee for bondholders, including these defendants, and such lien continues until payment in full of said bonds and is not subject to be divested, lost or in any manner terminated until such assessments are paid or the said bonds be fully satisfied; and these defendants further say that any attempt to take or any claim to said lands by tax deed or otherwise, free and clear of the lien of the assessments out of which the bonds of these defendants are payable, would constitute a taking of property without due process of law in violation of Article V of the Amendments to the Constitution of the United States, and further would constitute an impairment of the contract between the City of Wolf Point and these defendants contrary to and in violation of Section 10 of Article I of the Constitution of the United States forbidding the impairment of the obligation of contracts, and these defendants now expressly plead said provisions of the Constitution of the United States in support of their rights under said bonds of the City of Wolf Point now held by these defendants.

Wherefore, these defendants now pray the same advantage herein as though they had been complainants and that all rights and equities of these

defendants as bondholders may be ascertained and adjudicated herein with reference to the trust funds and trust property constituting the subject matter of the Bill of Complaint herein; and these defendants pray the consideration of this court of equity for the enforcement and administration of the trust created and established by law in favor of the holders of the special assessment bonds issued by the defendant, City of Wolf Point; and these defendants pray that said City may be compelled to reimburse the trust funds for any amounts diverted or misapplied therefrom and for all losses thereto by fault of said City, and to pay to these defendants whatever proportion and amounts may be found due and owing to these complainants out of such trust funds; and these defendants will ever pray for the protection and aid of the Court of Equity.

PAYNE AVENUE STATE BANK,
 JAMES G. GLASSNER,
 FULTON COUNTY BANK,
 DR. LOUIS D. HYDE,

Defendants.

By ROBERT N. ERSKINE,

Their Solicitor. [37]

Solicitor for defendants:

ROBERT N. ERSKINE,

111 W. Monroe St.,

Chicago.

CHARLES GORDON,

Wolf Point, Montana.

[Endorsed]: Received Jan. 8, 1931 and held for fee. Filed Jan. 12, 1931. [38]

Thereafter, on November 12, 1932, Report of Special Master, and Recommendations, were duly filed herein, being in the words and figures following, to-wit: [39]

[Title of District Court and Cause.]

REPORT OF SPECIAL MASTER AND RECOMMENDATIONS

This case was filed in this Court on or about the 3rd day of April, 1930, and involves moneys due on bonds issued by the City of Wolf Point on account of sewer construction work done in a special improvement district created by the city.

It appears from the pleadings that the suit involved four hundred lots in the city, and that the fund was to be raised to meet the bond issue by collection of ten annual assessments on these lots, commencing with the year 1919 and ending with the year 1928. A fixed amount was assessed against the various lots and then divided into ten installments which bore interest at six per cent. per annum; and it further appeared from the pleadings that many of the installments went delinquent and a determination of the issues called for the taking of testimony as to what payments were made, when they were made on the installments, and whether penalty and interest were collected, and much other data.

And it was further made to appear by a motion filed herein that virtually all evidence to be procured and offered [40] in the case was to come

from the books and records of the City of Wolf Point and county records located in the City of Wolf Point, and it was not feasible to remove these records to Great Falls, and that a Master should be appointed to take the testimony at the place where the records were located; and thereafter, on the 17th day of November, 1930, by an order duly given and made, and pursuant to the motion and, by agreement of counsel, for the parties, this Court appointed the undersigned as Special Master in Chancery, with authority to fix a time for taking testimony in Wolf Point, Montana, have the testimony reduced to writing, and with documentary evidence made up in a complete transcript, and make his report thereon and recommendations to this Court within a reasonable time thereafter. And thereafter he duly took the oath required by law, and, pursuant to stipulation of the parties, the case was set down for hearing in the State District Court Room, in Wolf Point, on Thursday, the 30th day of April, 1931, commencing at 10 A. M.

And, at the time appointed, Messrs. Marron & Foor appeared for complainant; Frank M. Catlin, Esq., and Messrs. Hurd, Hall & McCabe, for the defendant, City of Wolf Point; and Robert N. Erskine, Esq., of Chicago, Ill., for all other defendants. It was made to appear at the beginning of the hearing that the default of one defendant, A. W. Schreiber, had been entered, (Tr. 6), but notice

was given that a motion or petition would be filed to set aside the default and make him a party plaintiff in the suit, his interests being identical with those of the complainant.

All parties announced themselves ready to proceed and the Master appointed E. S. Koser (Tr. 3), of Plentywood, Montana, as Reporter, to take and transcribe the evidence and make a complete transcript. [41]

Evidence was introduced in behalf of all parties and the taking of testimony completed on the 8th day of May, 1931. The parties were then given time within which to submit briefs after completion of the transcript and various extensions were thereafter granted and the case finally submitted and now, within a reasonable time thereafter, the Master makes his report and recommendations to this Honorable Court.

All persons named as defendants, other than the City of Wolf Point, are bondholders and stand virtually in the same position as the complainant, except that they have taken a somewhat different position in their answer respecting the order in which the bonds are payable, but the issues involved were, as a matter of fact, between the defendant, City of Wolf Point, on one hand, and all other parties, on the other.

The Pleadings

The complainant, by way of amended complaint, alleged, among other things, the jurisdictional facts,

the passage and approval of a resolution confirming the issuance of bonds aggregating \$37,966.53 to cover the cost of making special improvements, that is, laying sewers in the special improvement district created by the ordinance. It further alleges that the bonds were actually issued for the amount, being for \$500.00 each, and numbered 1 to 75, inclusive; and an additional bond for \$466.53, which was issued, being paid at once; that they were registered in three groups and were payable in numerical order; that bonds numbered 42 to 75 (thirty-four bonds in all), representing the principal sum of \$17,000.00 are unpaid; that they matured January 1, 1929 and are past due; that bonds numbered 42 to 53 have been called but that on presentation the city refused to pay interest which had accrued, and that the bonds remain unpaid; that an assessment equal to the total principal sum of the bonds, [42] namely, \$37,966.53, was made against the lots in the district to take care of the bonds, payable in ten installments with six per cent. interest from March 10, 1919, which was declared pledged to the payment of the obligation; that the first installment came due in November, 1919, and that this and subsequent installments were actually put in the collection and that the City Treasurer has each year received portions of the assessments, with interest, but that there have at all times been delinquencies, some of which have been collected, but a part of which remain unpaid; that there has come into the hands of the Treasurer

a sum of money, the exact amount of which is not known to the complainant and cannot be ascertained, but it believes the amount to be \$43,069.93, which was dedicated to the payment of the bonds.

The complainant further alleges that the city officers, through the County Treasurer, are charged with the duty of collecting these assessments and administering the trust, and further complains:

(a) That certain specified sums have been diverted which have not been returned and which should have been applied on the bonds;

(b) Large sums have been collected and held for long periods without calling bonds for payment;

(c) That the city has neglected, in cases of default, to declare the full balance immediately due, and have allowed taxes and assessments to accumulate and tax deeds have been issued, and the security lost, and that the city has taken no action;

(d) That the assessment was not sufficient in the first place to meet the principal amount of the bonds and interest, but the city has nevertheless paid interest on the bonds as it accrued and called and paid certain bonds in full, and now [43] cannot pay a large number of the bonds owned by the complainant;

(e) That the city levied other assessments and overloaded these lots located in the district, and they could not be sold for the amount of the delinquencies and this was a breach of duty on the

part of the city, and the city should be required to compensate the complainant to the extent of the loss resulting to it;

(f) That the City Treasurer further had knowledge that on account of the delinquencies all bonds could not be paid and should therefore have apportioned moneys received instead of paying interest and the principal sum of the bonds in numerical order;

(g) That all of complainant's bonds, except perhaps No. 75, should have been paid, except for the neglect of the city.

(h) That the city should be required to act as trustee and further required to do all things necessary for the protection of the bondholders and that by reason of the delinquencies of the city, hereinbefore recited, it has become generally liable to the complainant.

All defendants except the City of Wolf Point and Schreiber admitted all allegations of the complaint, except as to the order in which the bonds were payable, and alleged that after a delinquency the fund should have been prorated and that interest and principal should have been kept separate, and further alleged that the lien was not lost through tax deed but continued.

The City of Wolf Point, by its answer, admitted the jurisdictional facts, passage of the resolution, assessment of the property, issuance of the bonds, and that they were called when funds were avail-

able and all had been paid except numbers [44] 42 to 75, inclusive, and that others were called but not paid. It also admitted that a tax was levied which was to be paid in ten installments, with interest at six per cent. per annum, and that the money was pledged to the payment of the bonds; admitted that the assessments were put into collection but that part of them were not paid.

The city further admits by its answer that it had received \$48,873.15 for application towards the payment of the bonds and interest, and admitted that there remained on hand the sum of \$6,273.34. It also admitted that the Treasurer is charged with the duty of collecting assessments and the distribution and payment of bonds and interest, and that such assessments have not been paid and part of the property had been sold for taxes and deed issued and the security forever lost; further admitted that the city paid in full interest first maturing and has paid bonds called for payment.

The city, however, denied and put in issue the following allegations of the complaint:

(1) Denied that the bonds were payable in numerical order and alleged that they were payable according to registration;

(2) Denied that the bonds bear interest at eight per cent. after maturity, and further denied a refusal to pay;

(3) Denied that the defendant was able to pay on account of delinquencies which amount to \$7,890.08, with interest and penalties;

(4) Denied that funds were diverted and allege that all funds were repaid which were diverted.

(5) Admitted that the city received the sum of \$48,873.15 for application to payment of the bonds and interest, and that it still had on hand the sum of \$6,273.34; [45]

(6) Further denied that the city held money for long periods or allowed interest to accumulate, or that moneys had been paid out as interest which should not have accumulated if bonds had been called and retired promptly; further denied that moneys were misappropriated;

(7) Denied that the city failed to declare all assessments due promptly or allowed them to accumulate;

(8) The city denied that it failed to make proper provision for interest on the bonds, or that the assessments were inadequate for paying the bonds;

(9) The city denied that the fund was depleted through payment of interest or bonds called improperly, or that it in any way prevented the plaintiff from receiving payment of its bonds;

(10) Denied that the levies against the property exceeded its value so that the county was unable to sell it for the amount due; denied a breach of duty to continue to levy assessments, or that the City Treasurer in any way was delinquent in the discharge of his duties;

(11) The city further put in issue the ownership of the bonds, and denied that the city became trustee

with all the attributes of such a relationship, or that the fund should be distributed proportionately, or that an accounting should be made;

(12) Further denied that there was any misapplication of funds, or that the city became directly and generally liable for the unpaid bond issue.

The pleadings briefly raise the issue of the liability of the city in connection with a bond issue of a special improvement district within the city where the city has been guilty of alleged delinquencies above referred to and where it is apparent that due to much of the property within the district going to [46] tax deed the bond issue will not be paid in full out of the moneys belonging to the special improvement district.

The Evidence in the Case

When the case came on for hearing the complainant offered county records by years showing the total special improvement taxes against the various lots within the district, whether or not the various assessments were paid, and, if so, when, and whether penalty and/or interest had been collected by the County Treasurer (Tr. 22), and whether the property went to tax deed, and, if so, the date of issuance of the deed.

By stipulation of the parties, (Tr. 67), it was agreed that beginning with the year 1921 it would be necessary to offer evidence only as to the delinquent record, and that it would be assumed that if

it did not appear from the record that the installment became delinquent, it might be deemed to have been paid, with interest provided for by the resolution, to the same extent as if testimony concerning the same had been introduced.

This record did not segregate moneys collected by the County Treasurer belonging to District No. 12, involved in this case, but merely showed all special assessments due for the particular year, and a determination of the amount of the assessment, interest and penalty, if any collected, belonging to District No. 12, involved extensive tabulations.

The cash book of the city, offered in evidence, disclosed the total amount of moneys paid over to the city for special improvements according to the city records, (Tr. 149). This record, however, made no segregation of moneys belonging to Special Improvement District No. 12—merely showing the total moneys paid over to the City Treasurer by the County Treasurer for all special improvements.

Solicitors for the city offered evidence on cross-[47] examination to show instances where penalty and/or interest had not been collected in cases where installments had become delinquent, (Tr. 154).

Evidence was introduced to show the amount of delinquent taxes due in cases where deeds had been taken, the appraised value of the property, date of sale, amount for which sold, and the amount which had been paid, (Tr. 168); also that the deferred payments bear interest at six per cent. per annum.

And evidence also was introduced showing the total delinquencies against particular lots in cases where tax deeds had not issued, (Tr. 175).

And the complainant introduced the city's record showing receipts of money from the County Treasurer belonging to this district, the payments being allocated to the various lots within the district, (Tr. 186). This record, however, makes no mention of penalty and/or interest in cases where the installment was not paid in time and became delinquent before payment, and had evidently been collected by the County Treasurer, according to evidence introduced in the case. (See Tr. 22, et. seq.)

The testimony disclosed the amount of money paid by the County Treasurer to the City Treasurer as its proportionate part of the receipts from sales of lots in the district for which tax deeds had been taken. The evidence, however, did not show what part of this money belonged to District No. 12, but it is possible, by determining the total delinquencies on these lots and the total delinquencies on installments belonging to District No. 12, to determine what proportionate part of the moneys turned over to the City Treasurer belonged and should be allocated to District No. 12. [48]

FINDINGS OF FACT

The record includes considerable other testimony and documentary evidence offered in behalf of both parties and the aggregate thereof made up a very

compact and voluminous record. An analysis of this report called for exhaustive calculations and extensive tabulations, which could not in any feasible manner be made a part of this record, and it does not appear that they would serve any useful purpose. To set up in proper form, furthermore, for the purpose of making a part of this report, would entail considerable expense which it does not appear would be justified.

At the outset of the trial an issue was raised as to whether, inasmuch as the complainant was seeking an accounting, Equity Rule 63 was applicable, and the city was required to bring in its account in the form of debtor and creditor. The City of Wolf Point, which, for brevity, will hereafter be referred to as the defendant, contended that the complainant was not entitled to an accounting and that the accounting was merely incidental and the case involved many other questions, (Tr. 8).

The moneys derived from special assessments were by the city ordinance creating the district irrevocably pledged to the payment of the bonds, (pg. 1, Exhibit 1 attached to Amended Bill of Complaint). And, whether the city is to be regarded as a trustee or as an agent of the bondholders, the moneys coming into the hands of the defendant from such source, it appears, should be accounted for and should be used only for the purpose of retiring the bonds and paying the interest. And such money is, in a sense, at least, trust funds in the hands of the city. However, in view of the numerous

and intricate issues raised in the pleadings and the fact that the defendant denied that the complainant was entitled to an accounting and did account for so much money by admitting that it had received as moneys of the district the sum of \$48,873.15, and had on hand for application [49] to the payment of the bonds the sum of \$6,273.34, (See answer, City of Wolf Point and Tr. 406), it appeared that notwithstanding the fact that much of the evidence to be introduced in the case was in the custody of the defendant, it was proper to require the complainant to take the initiative in the case and at least make out a prima facie case and establish by preponderance of the evidence the contraverted allegations of its complaint which do not involve the mere question of an accounting. (Tr. 8 et seq.)

One of the issues raised by the pleadings involves the manner in which the bonds should have been paid. The complainant alleges that they were payable in numerical order and callable when funds were available for retirement of one of them (Par. 6 Amended Complaint). The City of Wolf Point, on the other hand, asserts that they were payable in order of registration (See separate answer, City of Wolf Point); whereas, the other defendants take the position that as soon as an installment of the assessments became delinquent, then bonds should not have been called and paid in full, but this should have constituted notice to the City that there was going to be a shortage of moneys with

which to retire the bond issue, and that the moneys thereafter should have been prorated.

The Master finds from the evidence that the bonds were called and paid in numerical order; that while they were also retired in the order of registration, only part of those registered on a particular date were called and paid at that time; that of the unpaid, 42 to 54, inclusive, were registered November 20, 1918 and 55 to 75, inclusive, May 27, 1919, (See Certificates on Bonds); and under the pleadings it is admitted that bonds 42 to 53 were on certain dates called for payment (See Answer of City of Wolf Point), which did not represent the entire number registered on a particular date. The bonds called, it appears, were [50] not paid because interest was demanded, although the evidence discloses that there was no record of any proceeding directing the City Treasurer not to pay interest on bonds after maturity, (Tr. 185).

A contention of the complainant, contraverted by the defendant, is that the bonds bear interest at the rate of eight per cent. per annum after maturity. The bonds provide for six per cent. per annum "From date of registration of the bond until the date called for redemption." It appears that the bonds matured, if not previously redeemed, January 1, 1929, and since at that time had become due and payable, it seems that the rate of interest thereafter would be the legal rate payable on any obligation past due, but payable, of course, out of the fund belonging to District No. 12. Since the fund

will manifestly never be sufficient to discharge the principal sum of the bonds, the matter of interest does not seem important.

The evidence discloses that moneys belonging to the district were diverted and placed in other funds.

The Master finds that pursuant to an ordinance designated No. 100, funds were transferred, (Tr. 184), out of the fund belonging to this district. These transfers were in the amounts and occurred on the dates set opposite thereto, and were returned on the dates appearing after the respective amounts, as follows:

<u>Amount</u>	<u>Date of Diversion</u>	<u>Date of Repayment</u>
\$ 511.67	Jan. 23, 1922	May 6, 1929
40.00	Jan. 4, 1922	"
522.55	Nov. 30, 1921	"
747.00	May 31, 1922	"
1,908.32	"	"

(Tr. 404, and see also Tr. 373, 379 and 392.) [51]

An examination of the bond records (Exhibit 48, separate from transcript), discloses payments made at intervals running over the entire period, commencing with January, 1920, following shortly after the collection of the first installment of taxes. From an analysis of the record of receipts of money by the City Treasurer and a comparison with the disbursement record, it does not appear that there was any large amount of money on hand at any

time which should have been applied to the payment of bonds, and the Master finds that, except for the diversions above referred to and which may hereafter be referred to, the charge that the city allowed large sums of money to accumulate without using to apply on bonds has not been sustained.

A conclusion as to the manner in which the diversions should have been handled is given in this report under Conclusions of Law.

The evidence shows that \$100,000 was paid out of the funds belonging to the district in having an audit made of the books of the city, this being regarded as the proper proportionate part of the expense of an audit which should be taken care of by the district. The Master finds that the district was never reimbursed on account of this disbursement. It does not appear that by use of adequate records an audit of the accounts pertaining to the district should have been necessary.

The pleadings indicate, and the Master finds, that the amount of the assessments coincided with the total bond issue; that each provided for interest at six per cent per annum, and, while the ordinance only provided for interest from final passage of the ordinance (See copy attached to amended bill), the set-up called for one year's interest on the first installment, or interest from November 30, 1918. Part of the bonds were not registered and did not bear interest except from May 27, 1919. (See bonds for date of registration). The total of assessments,

[52] (Schedule at back of amended bill), amounted to slightly more than the principal sum of the bonds, namely, to an aggregate of \$38,011.20, and if installments had not become delinquent the amount realized from the assessments would have been ample to meet the bond issue. There was no evidence offered respecting the value of the various lots as to which deeds were issued.

The record reveals other special assessments against the property in the district, but the Master finds that the charge of excessive levies against the property has not been proven.

He further finds, however, that the property as to which tax deeds were issued, in numerous cases, was appraised at less than the aggregate of delinquent taxes and special assessments against the lots, and were sold for less than the total amount due. (Tr. 168).

The Master further finds that the following persons are the owners of the bonds numbered as appears after their respective names, aggregating the respective totals appearing after the bond numbers, to-wit:

Bond Number	Name	Amount
42-44, Incl.	A. W. Schreiber	\$1,500.00 (Tr. 7)
45-58, Incl. and 75	Hanchett Bond Company	7,500.00 (Tr. 6)
59-66, Incl.	Payne Avenue State Bank of St. Paul	4,000.00 (Tr. 408)
67 and 74	James Glassner	1,000.00 (Tr. 409)
68-72, Incl.	Fulton County Bank of McConnellsburg	2,500.00 (Tr. 409)
73	Dr. Louis D. Hyde	500.00 (Tr. 408)

With regard to the issues raised in the complaint and in the joint brief of the complainant and defendants, other than the City of Wolf Point, that the City Treasurer has been [53] derelict in the discharge of his duties and that other officials of the city and county have been guilty of delinquencies with respect to this bond issue, the Master finds that some of the assessments became delinquent in 1919 (See Tr. 22, et seq.), and that each succeeding year numerous assessments became delinquent and remained unpaid; that money belonging to the district was collected through the County Treasurer; that deeds to property were not taken on 1919 delinquencies or delinquencies for succeeding years until 1929; that the evidence does not disclose that upon an assessment becoming delinquent the Treasurer took any action with a view of declaring all subsequent assessments immediately due and payable, (Tr. 185); that subsequent to the passage of Chapter 96, Laws of 1923, the assessments were collected in two installments, although at the time the bonds were issued they were delinquent if not paid in November.

The records kept by the officials were inadequate and from the records introduced in evidence, it was impossible to determine readily what moneys were turned over to the city which should have been allocated to District No. 12.

The records of the city offered in evidence do not disclose the exact date when moneys were re-

ceived by the city, (Tr. 186). The city records offered do not show what moneys were turned over as penalty and interest, (Tr. 186), yet the total moneys receipted for by the city and the admissions indicate that such funds were accounted for by the county.

Regarding the contention of complainant that the proper city official did not certify the amount due in special assessments each year, a finding is made that the amount was certified by an official of the city, namely, the City Clerk.

The county failed to collect penalty and/or interest in some cases where the installments had become delinquent even though the penalty had not been remitted by legislative enactments, (e. g. Tr. 123.) [54]

The city records introduced did not show payments applicable to various lots received from the county after the issuance of tax deeds, (Tr. 186). The record bears out the charge that lots were subdivided subsequent to the imposition of the assessment, (e. g. Tr. 118, Lot 8, Block 6, et al.); that taxes were delinquent on a number of lots for more than thirty-six months prior to the institution of this action as to which tax deeds had not been applied for.

There is no evidence that the bondholders made any protest or initiated any action on account of the matters complained of until this suit was filed. They made no demand for a return of the moneys diverted to which reference has heretofore been made, (Tr. 395).

Three bonds were presented but not paid because interest thereon after maturity was demanded, (Tr. 399).

The city, at the close of the hearing, tendered the sum of \$6,710.39 in Open Court, which, by stipulation, it was agreed, should be left in the hands of the city, (Tr. 405).

The city has admitted that it has received the sum of \$48,873.15 for special assessment District No. 12, and an analysis of the testimony and documentary evidence offered conclusively establishes that due to numerous cases of delinquencies in the district and non-payment of assessments, the amount turned over to the city by the county, representing collections for the district, could not have exceeded this amount. The answer of the city was filed September 2, 1930.

The Master finds that the defendant issued seventy-six bonds against the district, one of which, for \$466.33, was paid at once; that bonds numbered 1 to 41, inclusive, have since been paid; that it has paid out the total principal sum of \$20,966.33, and the further sum of \$16,874.58 as interest; that up to and including January 18, 1930 it had paid out the total [55] sum of \$37,840.91 in discharge of bonds and payment of interest on the bond issue of District No. 12; and that no further or additional disbursements had been made, chargeable to District No. 12.

A finding is further made that by reason of the number of lots which had gone to tax deed, and the amount for which many of the lots have been resold, it does not appear that sufficient will be realized from its proportionate part of the purchase price, or from delinquencies in cases where deeds have not issued, to ever discharge the bond issue in full; that at the time of the hearing there remained a substantial sum due to the district on delinquent assessments in cases where tax deeds had not issued, part of which may have been or may hereafter be, collected; and there was also a large part of the purchase price of lots sold on contract after the issuance of tax deed unpaid, and the district will be entitled to its proportionate part of moneys collected on these contracts.

A further finding is made that \$17,000.00, represented by thirty-four bonds, remains unpaid; that interest thereon has been paid to date of maturity of the bonds, to-wit, to January 1, 1929.

Conclusions of Law

The county was not a party to this suit, nor was any official of the city or county, and the issues are between the city and the bondholders. The bondholders, by charges, which they have for the most part sustained by proofs, raise issues which it appears naturally fall under three heads:

(1) Whether they are entitled to an accounting on the part of the city in this case;

(2) Whether, by reason of acts of omission and commission complained of, as to which findings have been made above, [56] it can be said that the city has been negligent and that the bondholders have, as a result, suffered damages, and the city should respond to the extent of the loss suffered; or,

(3) Whether, by reason of such acts, the fact that the bonds are payable out of a particular fund can be cast aside and moneys taken from the general coffers of the city, under process of this Court, with which to discharge the bond issue in full, on the theory that a general liability has resulted.

Improvement bonds do not ordinarily create a personal liability against the municipality and generally an action cannot be maintained on the bonds to recover a general judgment.

Steiner v. Capital Heights (Ala.) 105 So. 662.

But, if the funds are in the district to meet the obligations, the relation between the city and the bondholder is then virtually that of debtor and creditor, recourse, however, being limited to a particular fund.

If the administration of the fund has been regular and there is no money in it with which to liquidate the bondholder's claim, he has no recourse.

Other issues have been raised in this case, however, and, as solicitors for the bondholders have said, this is not so much a suit on the bonds as by reason of the bonds.

It is a proceeding in equity, instituted for the purpose of going behind the assessment fund itself.

The complainant and others have unpaid bonds; they are past due; they apply to the city and are advised that only a certain sum has come into the hands of the city which is insufficient to meet the amount due on the bonds outstanding. The original assessment was sufficient to take care of these obligations and when the bondholder holding an unpaid obligation presents his bond after maturity and finds the coffer empty or [57] insufficient money on hand to liquidate his and other claims, he has the right to come into equity and delve into the matter to find out what is wrong.

Whether regarded as a trustee or merely as an agent, of the bondholder, since the fund is irrevocably dedicated to the payment of the bonds by the ordinance which created the district, every dollar belonging to the fund is trust money to be used exclusively for retirement of the bonds and interest. It would be trust money whether the city is to be considered a trustee or merely an agent as moneys of the principal in the hands of the agent for a specific purpose is trust money and the relation of debtor and creditor does not exist as to it.

In view of this conclusion, it does not seem necessary to determine whether the city is a trustee or merely an agent.

2.

Counsel for the bondholders have cited numerous authorities in their brief to sustain the proposition

that the city is a trustee in such a case (Joint Brief of complainant and other bondholders), and with this we agree insofar as those cases hold that the money coming into the hands of the city belonging to the fund must be allocated to the payment of bonds, and dedicated to that purpose and used for no other.

The decisions cited by the complainant and the solicitors for the defendant appear to be in harmony with this rule but there appears to be a conflict of authority as to the extent of diligence the city is required to show in bringing about the payment of special improvement taxes. Some decisions cited by complainant hold that the city must be alert and exercise a high degree of care and diligence in attempting to bring about a collection of the assessments, and that it must be guilty of neither acts of omission or commission. On the other hand, [58] counsel for the defendant have cited numerous western decisions from which it is to be inferred that the city can assume a passive role and if installments are not being taken care of, it is for the bondholders to initiate some action for the purpose of safe-guarding their interests. None of the decisions hold the city to be a guarantor of collection or payment. This would be virtually tantamount to a general liability on the part of the city.

Securities of this kind are regarded as precarious and subject to certain hazards, not affecting securities which are payable out of a general fund.

On the one hand, however, numerous authorities state the rule to be that the city is liable as a trustee for failure to collect the assessments and require the city to do everything reasonably necessary and to exercise great diligence to accomplish that end.

6 McQuillan Municipal Corporations, Par. 2428.

But the Supreme Court of Montana, in *Gagnon vs. City of Butte*, 75 Mont. 279, said:

“Primarily the City of Butte incurred no personal liability to the contractor who did the work. It was merely constituted an instrumentality of the law in initiating and carrying out the improvements and in collecting the money due upon assessments made by it against the property benefitted in order to pay the obligations incurred in execution of the work. * * * The plaintiff because of his interest in having the obligations paid, was required to know that which was being done or left undone in the premises by the city treasurer, and was afforded ample remedy under the law to compel the city treasurer to follow the mandates of the statute in the subjection of property embraced within the improvement district to the payment of the assessments levied. Consequent to the nature of the bonds and the law authorizing their issuance he had a special interest in seeing that the city treasurer made collection

of all delinquent assessments within the improvement district or subjected the property benefited to sale where the owners thereof had failed to pay the tax, whereas the general taxpayers would, in most instances, be entirely oblivious of the failure of the city treasurer to perform his simple duty in this [59] respect and of possible consequences.”

This Honorable Court, in *Lumbermens' Trust Company v. The Town of Ryegate*, cited by counsel for the defendant, expounded this same doctrine, and, while that case has been reversed on appeal, it does not appear that the reversal was the result of the Appellate Court's disapproval of the rule announced.

The lack of harmony in the decisions seems to be in connection with the acts of omission and commission of the city and its officers.

See Note *Goddard v. Inhabitants, etc.*, 30 A. S. R. 376.

Since this case involves a local question, it appears that the Laws of the State of Montana should be the rule of decision. The conclusion is therefore reached that the city, in the administration of this fund, is a mere conduit for receiving moneys belonging to the district and passing them on to the bondholders. It may be likened to a conduit because of the fact that no part of the funds should be intercepted, and it should deliver to the bondholders

all that it receives and because also its administration of the fund may be passive and not active.

It is furthermore the opinion of the Master that the preponderance of the evidence does not establish that the bondholders suffered any loss by reason of the acts of the city, assuming that it was the duty of the city to actively and with diligence endeavor to collect the assessments. What has been said, however, has no application to the right of the bondholders to collect interest on account of diversion of funds. The rule adhered to in this jurisdiction is based upon the theory that to require the general taxpayers to discharge the obligations would be to compel one who had received no benefit to pay an indebtedness which was not his. If the city diverted and used money belonging to the fund, however, the general taxpayer was benefited [60] thereby and the bondholder was damaged to the extent of interest at the rate provided for in the bond and the conclusion is therefore reached that the city should be required to respond to the extent of interest at six per cent. per annum from date of diversion of the various amounts until repayment.

3.

In view of what has been said, it is the opinion of the Master that the facts do not justify holding the city generally liable but that the judgment, however, should be in favor of the bondholders for the amount of moneys the city has received belong-

ing to the district, less the amount actually disbursed in retiring bonds and payment of interest accruing on the bonds; and for a further sum equivalent to interest on the various amounts diverted as aforesaid.

This claim is not barred by the statute of limitations or due to laches of the bondholder, as it appears interest was regularly paid and the bonds did not mature until the first of January, 1929. All bonds having matured prior to the time when certain of the unpaid bonds were called for payment and moneys not being available for payment of the entire issue at that time, the money, being trust money, should be prorated among the bondholders appearing in the case and whose appearance may hereafter be allowed.

Jewell v. City of Superior, 135 Fed. 19;

Rater v. City of Superior, 91 N. W. 651.

Solicitors for complainant and other bondholders strenuously assert in their brief that from the time of the first delinquency in the payment of assessments, which occurred in 1919, the city should have been put on notice that the issue was not going to be paid in full and the money should thereafter have been prorated. No complaint was lodged with the city officials, however, and from aught that appears in the record the method of re- [61] tirement of bonds in numerical order was entirely satisfactory to the holders until the city refused to pay interest after maturity on bonds called for payment.

RECOMMENDATIONS

The Master therefore hereby respectfully makes the following recommendations to this Honorable Court:

1. That this Court, by its judgment and decree find:

(a) That A. W. Schreiber is the owner of three bonds and there is due and owing to him on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of \$1,500.00, together with interest thereon at 8% per annum from January 1, 1929;

(b) That the Hanchett Bond Company is the owner of fifteen bonds and there is due and owing to it on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of \$7,500.00, together with interest thereon at 8% per annum from January 1, 1929;

(c) That the Payne Avenue State Bank of St. Paul, Minnesota, is the owner of eight bonds and there is due and owing to it on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of \$4,000.00, together with interest thereon at 8% per annum from January 1, 1929;

(d) That James Glassner is the owner of two bonds and there is due and owing to him on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of \$1,000.00, together with interest thereon at 8% per annum from January 1, 1929;

(e) That the Fulton County Bank of McConnellsburg, Pa., is the owner of five bonds and there is due and owing to it on said bonds, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of \$2,500.00, together with interest thereon at 8% per annum from January 1, 1929; [62]

(f) That Dr. Louis B. Hyde is the owner of one bond and there is due and owing to him on said bond, payable in the manner hereafter provided, out of moneys belonging to the special fund of District No. 12, City of Wolf Point, the sum of \$500.00, together with interest thereon at 8% per annum from January 1, 1929;

2. That moneys received by the city since the filing of the answer or hereafter coming into the hands of the city, belonging to District No. 12, shall be prorated among the bondholders according to their several claims;

3. That the Court find that the city had on hand, at the time it filed its answer herein, as funds belonging to the district, the sum of \$11,032.24, and that a judgment in favor of the bondholders, against the city, be granted accordingly, and the moneys derived therefrom be prorated;

4. That the Court further grant judgment in favor of the bondholders for interest at six per cent. per annum on:

\$ 511.67	from	January 23, 1922	to	May 6, 1929;
40.00	“	“	4,	“ “ “ “ “
522.55	“	November 30, 1921	“	“ “ “ “
2,655.32	“	May 31, 1922	“	“ “ “ “

being a total of \$1,355.83; to also be pro-rated;

5. That if it is at any time made to appear by petition of a judgment creditor, or creditors, herein, that any part of the judgment remains unpaid and moneys have been collected belonging to the district which should be applied to the payment of the judgment, an order to show cause may be issued herein on such petition;

6. That complainant and the bondholders have judgment for their costs herein; that the total costs in this action, Case No. 1583, and in Case No. 1887, a companion case heard at the same time, be divided, pursuant to stipulation of the parties, (Tr. Case 1887, p. 3), in the ratio of Five-sixths of the cost to be assessed in this case, and One-sixth charged to Case No. 1887; [63]

7. That the aggregate charges of the reporter were \$528.30 and have been paid by the parties; the expenses and compensation of the Master have not been allowed or paid, and a separate application for allowance and an order directing payment thereof will be made.

Dated November 9, 1932.

Respectfully Submitted,

G. G. HARRIS

Special Master.

November 12, 1932,

Copies Mailed as Follows:

MESSRS. MARRON & FOOR,

Wolf Point, Montana;

FRANK M. CATLIN, ESQ.,

Wolf Point, Montana;

MESSRS. HALL & McCABE,

Strain Building,

Great Falls, Montana;

ROBERT N. ERSKINE, ESQ.

c/o Kraft & Erskine,

Harris Trust Building,

Chicago, Illinois.

[Endorsed]: Filed Nov. 12, 1932. [64]

Thereafter, on November 25, 1932, Exceptions of City of Wolf Point, Montana, to report and recommendations of Special Master, were duly filed herein, being in the words and figures following, to wit: [65]

[Title of District Court and Cause.]

EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

Comes now the above named defendant, City of Wolf Point, and excepts to the report and recommendations of the Special Master filed herein on the 12th day of November, 1932, as follows:

1. Excepts to the finding of the Master appearing on page 12 of said report that the evidence discloses no record of any proceedings directing the city treasurer not to pay interest on bonds after maturity, for the reason that said finding is contrary to the evidence which discloses that the City Treasurer was directed by the Mayor of said City not to pay interest on bonds after the maturity thereof.

2. Excepts to the finding of said Master appearing on page 12 with relation to the payment of interest upon said bonds after maturity at the legal rate for the reason that said finding is contrary to law. [66]

3. Excepts to the finding of said Master appearing on page 12 with relation to the division of funds belonging to said district for the reason that said finding is not sustained by the evidence in said cause and is contrary to the evidence appearing therein.

4. Excepts to the finding of said Master appearing on page 13 with relation to the failure to re-

imburse said district in the amount of \$100.00 for the reason that said finding is not sustained by the evidence in said cause and is contrary to the evidence therein.

5. Excepts to the finding appearing on page 14 with relation to the sale of property for delinquent taxes for the reason that said finding is incomplete in this, that it does not disclose that said property was sold by the County of Roosevelt for such delinquent taxes and not by the City of Wolf Point.

6. Excepts to the finding of the Master appearing on pages 14 and 15 with relation to the dereliction and negligence of the city treasurer and other city and county officials for the reason that said finding is not within the issues of said cause, neither the city treasurer nor any other city or county official having been made a party to this action, and for the further reason that said finding is incomplete in that it does not find that the property involved was sold and deeds taken thereto by the county treasurer of Roosevelt county.

7. Excepts to the finding of said Master appearing on page 16 with relation to the sum of money received by the City for Special Assessment District No. 12, for the reason that said finding is not sustained by the evidence and is contrary to the evidence adduced at said cause.

8. Excepts to the finding of said Master appearing on pages 16 and 17 with relation to the amount paid by said [67] city out of funds belonging to

said District No. 12, for the reason that said finding is not sustained by the evidence and is contrary to the evidence adduced at said hearing.

9. Excepts to the conclusion of said Master appearing on page 19 that the money collected by the city and belonging to said Special Improvement District is trust money and that the relation of debtor and creditor does not exist as to it for the reason that said conclusion is contrary to law.

10. Excepts to the conclusion of said Master appearing on pages 21 and 22 with relation to the payment of interest on funds alleged to have been diverted from said Special Improvement District, for the reason that said finding is in conflict with the finding of said Master "that the evidence does not establish that the bondholders suffered any loss by reason of the acts of the City" and for the further reason that said conclusion is contrary to law.

11. Excepts to the conclusion of the Master that the claim of said bondholders is not barred by laches in the statute of limitations for the reason that said conclusion is contrary to the evidence and the law.

12. Excepts to recommendation number 3 appearing on page 24 of said report upon the ground and for the reason that said recommendation is not sustained by the evidence adduced in said cause, and in fact is contrary to the evidence therein.

13. Excepts to recommendation number 4 appearing upon page 24 of said report for the reason that said recommendation is not sustained by the

evidence adduced in said cause and is contrary to such evidence and is contrary to law.

14. Excepts to recommendation number 6 appearing upon page 24 of said report for the reason that said recommendation is not sustained by the evidence adduced in said cause [68] and is contrary to said evidence, and for the reason that as appears from the evidence in said cause and the law applicable thereto the defendant City of Wolf Point should have judgment herein for its costs.

Dated this 22nd day of November, 1932.

FRANK M. CATLIN

HALL & McCABE

Attorneys for Defendant

City of Wolf Point.

[Endorsed]: Filed Nov. 25, 1932. [69]

Thereafter, on December 14, 1932, Order Allowing Fees of Special Master, and directing payment thereof, was duly filed and entered herein, being in the words and figures following, to-wit: [70]

[Title of District Court and Cause.]

ORDER ALLOWING FEES OF SPECIAL
MASTER AND DIRECTING PAYMENT

A petition for allowance of fees having been filed herein by the Special Master in the case, and it appearing therefrom that the charges made and the expenses alleged to have been incurred by the Master are fair and reasonable,

It is ordered that the sum of \$495.00 be, and the same is hereby, allowed as fees and expenses of G. G. Harris, Special Master in Chancery herein; and,

It is further ordered that the same be forthwith paid by the defendant City of Wolf Point, such disbursement to be assessed as part of the costs in this case, and if not paid within 15 days, the Master may have execution issued therefor.

Done this 14th day of December, A. D. 1932.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and entered Dec. 14, 1932. [71]

Thereafter, on January 9, 1933, Exceptions to Report and Recommendations of Special Master were filed by the complainant herein, being in the words and figures following, towit: [72]

[Title of District Court and Cause.]

EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER.

The complainant together with the defendant bondholders except to the report of the Special Master in Chancery in this cause in the following particulars:

1. The finding (Report pp. 16) that one bond in the amount of \$466.33 was issued and paid at once is not in accordance with the records of the City in evidence. Reference is made to the bond

register of the City in evidence as complainant's Exhibit 39. (Note:—Brief for counsel of the City in support of exceptions, at page 7, concedes that bonds were paid only in the amount of \$20,500.00 instead of \$20,966.33 as found by the Master.)

2. The conclusion (Report pp. 21) that the City in the administration of this fund is a mere conduit for receiving moneys belonging to the district and passing them on to the bondholders, and further that the administration of the fund by the City may be passive and not active, are not in accordance with the law whether as expressed in the statutes or by [73] the decisions of any courts. These conclusions are not in accordance with the findings of the Master's report which plainly indicate that the City did have some active duties to perform.

3. The Master should have found what duties were proper to be performed by the city pursuant to the statutes of Montana and the extent to which such duties had not been performed and what should be done in the future in the fulfillment of those duties.

4. The conclusions (Report pp. 21) that the evidence does not establish that the bondholders suffered any loss by reason of the acts of the City is contrary to the findings of the Master's report. The actual losses sustained are matters of computation which should have been made by the Master from the evidence before him.

5. The Master should have found as to all those cases where the full amount of an assessment with penalty and interest had not been collected either (a) that it was the duty of the City to now proceed to make collection of the balance; or (b) if it should appear that such balance was now uncollectible by reason of the failure of the City to collect in due course, that the city thereby became liable for the amount which should have been collected with the computation of such amount.

6. The conclusion (Report pp. 22) that the interest to be allowed upon diverted funds should be the rate provided for in the bonds is not in accordance with the law or the facts in this case. The Master should have found that the liability of the City is to make restitution to the District No. 12 fund of the amount diverted therefrom together with interest at the legal or statutory rate of eight per cent (8%).

7. The third recommendation (Report pp. 24) should show the balance on hand larger to the extent of \$466.33, inasmuch as there was no payment of such bond as referred to in Exception No. 1 above.

8. The fourth recommendation of the Master (Report pp. 24) should have included an amount of interest computed at eight per cent (8%) instead [74] of six per cent (6%).

9. The Master should have recommended a judgment upon the bonds with the condition of payment

from the District No. 12 fund, as a basis for mandatory relief.

10. The Master should have recommended mandatory relief requiring the City to fully perform its duties.

ROBERT N. ERSKINE

CHARLES GORDON

Soli. for deft. bondholders.

ARLIE M. FOOR

Soli. for Complainant.

[Endorsed]: Filed Jan. 9, 1933. [75]

Thereafter, on January 10, 1933, Order substituting Carnegie National Bank as Plaintiff, was duly filed and entered herein, being in the words and figures following, towit: [76]

[Title of District Court and Cause.]

ORDER

This cause now coming on to be heard upon the Petition of the Carnegie National Bank, a resident of the City of Carnegie, in the State of Pennsylvania, and it appearing and the court now finding that said Carnegie National Bank now holds all right, title and interest by assignment of the interest of the Hanchett Bond Company in and to these proceedings and in and to the bonds sued for of District #12 of the City of Wolf Point, and being now fully advised in the premises;

Therefore, it is ordered, that the Carnegie National Bank be and it is hereby substituted as Complainant in the above entitled cause in place and as the assignee of The Hanchett Bond Company, all proceedings in this cause to stand without prejudice as though said Carnegie National Bank had originally been a party hereto.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and entered Jan. 10, 1933. [77]

Thereafter, on January 10, 1933, Order vacating default of A. W. Schreiber, etc., was duly filed and entered herein, being in the words and figures following, towit: [78]

[Title of District Court and Cause.]

ORDER

This cause now coming on to be heard upon the Petition of Minnie Luebbe, a resident of the City of Carnegie and State of Pennsylvania, and the court having examined said Petition and being now fully advised,

Therefore, it is ordered, that the default heretofore entered in these proceedings against one A. W. Schreiber, as a defendant, be and the same is hereby set aside; that the said Minnie Luebbe be substituted in these proceedings in place of said A. W. Schreiber as the owner of bonds numbered 42, 43

and 44, issued for Improvement District #12, City of Wolf Point; and that the said Minnie Luebbe be and she is hereby permitted to join in these proceedings with the complainant, the amended Bill of Complaint herein and all proceedings in this cause to stand as though the said Minnie Luebbe were originally a party hereto.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and entered Jan. 10, 1933. [79]

Thereafter, on January 10, 1933, Order granting leave to amend answer of Payne Avenue State Bank, et al, was duly filed and entered herein, being in the words and figures following, towit [80]
[Title of District Court and Cause.]

ORDER

This matter now coming before the court upon the motion of the defendants, Payne Avenue State Bank, James G. Gleassner, Fulton County Bank and Dr. Louis D. Hyde, to amend the Answer heretofore filed by them, and the Court having examined said Motion, considered the suggestions made in support thereof, and being now fully advised in the premises.

Therefore, it is ordered that leave be and is hereby granted to the above named defendants to amend their Answer heretofore filed in these pro-

ceedings and the said Answer shall be deemed to be amended on its face by substituting the words and numerals "Section 1 of Article XIV" in place of the words and numeral "Article V," wherein reference is made in said Answer to Article V of the Amendments to the Constitution of the United States.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and entered Jan. 10, 1933. [81]

Thereafter, on January 10, 1933, Order directing payment to certain bondholders, was duly filed and entered herein, being in the words and figures following, to wit: [82]

[Title of District Court and Cause.]

ORDER

This cause coming on to be heard upon motion of complainants and defendant bondholders, and upon the report filed herein by the Special Master in Chancery in this cause, and upon exceptions filed thereto with briefs and oral arguments presented by all parties;

And it appearing from said report that the City of Wolf Point has heretofore tendered as payment upon the bonds issued for District No. 12 the sum of \$6710.39 which sum has been held by said City by consent of all parties subject to the order of the

court, and the Master has recommended the pro rata distribution of all sums upon all outstanding bonds found to be in the amount of \$17,000.00.

And the holders of all bonds being before the Court in this cause, and now in open court having consented to such pro rata distribution, and the City of Wolf Point making no objections thereto; and all parties having consented to an immediate payment of a part of such moneys without prejudice to the rights of any of the parties hereto upon any other issue in this cause, subject only to the retention of a sufficient [83] amount to protect against any costs in these proceedings.

Therefore, it is ordered that this cause shall be taken under advisement by the Court upon the report of the Special Master and upon the exceptions now on file thereto, and upon the briefs and oral argument filed and presented, with leave to the defendant, City of Wolf Point to file a further reply brief if so advised.

And it is further ordered that the City of Wolf Point may and shall pay to the holders of such bonds of Improvement District No. 12 the total sum of \$4590.00. Such payment to be made in pro rata proportion upon all bonds, being payment of 27 per cent of the face amount of such bonds to be endorsed upon each bond; and the Treasurer of the City of Wolf Point is hereby authorized to make such payment to the solicitors appearing herein for all bondholders, Arlie M. Floor and Robert Ers-

kine and to take the receipt of said solicitors for such payment; and the Clerk of Court is hereby authorized and directed to endorse such payment on all such bonds now on file herein as evidence in this cause.

Dated this 10th day of January, 1933.

CHARLES N. PRAY

Judge.

Approved

H. C. HALL

ROBERT N. ERSKINE

ARLIE M. FOOR.

[Endorsed]: Filed and entered Jan. 10, 1933. [84]

Thereafter, on May 2, 1933, Memorandum Decision on Special Master's Report, was filed herein, being in the words and figures as follows, towit:

[85]

[Title of District Court and Cause.]

MEMORANDUM DECISION.

The court has given consideration to the two suits of the Hanchett Bond Company, a corporation, against the city of Wolf Point, and others, numbers 1583 and 1887, the reports of the Special Master, George G. Harris, in both cases, arguments and briefs of counsel, the pleadings and evidence

therein. That the special master is entitled to favorable mention is evidenced by the painstaking efforts disclosed by his reports.

The court should adopt the reports of the master unless it clearly appears that there are errors or mistakes that should be corrected. Certain questions have been raised to which the court will refer; aside from these both reports will be approved and adopted as the findings and conclusions of the court.

In respect to interest on the funds shown as having been diverted and set out on page 12 of the Master's report, and again referred to on pages 21 and 24, in case No. 1583, wherein he recommends judgment at 6% on the amounts given from the respective dates of diversion to those of repayment, counsel for the city claim that the record does not disclose any benefit to the city and that during the period of diversion the bondholders of district No. 12 received the full amount of interest at 6% as provided in the contract between the district and the bondholders; that they are entitled to no more interest and that there has never [86] been any default in that respect, citing R. C. M. 1921, Sec. 5249; that this section is a part of the contract, citing *State ex rel Malott v. Conners*, 89 Mont. 37. That "the general taxpayers of the city derived no benefit from money used to pay other special improvement bonds—apparently a mistake of the treasurer—or from mere book entries transferring on the city books from one fund to another without

actual use or expenditure." That the bondholders have already received 6% as provided by contract and that if this further payment is required they will be given 12% during the period of diversion shown in the master's report. The court does not agree with this contention. The restored fund, which had been diverted, with the interest thereon, should be applied in payment of the bonds, and the rate of interest should be controlled by the terms of the bond.

As to the question of interest payable after maturity, the Supreme Court of California held, in a case, hereinafter referred to, under facts similar to those present in this case, that interest can not be collected after maturity. The bond in this case provides: "This bond bears interest at the rate of (6) six per cent per annum from the date of registration of this bond as expressed herein until the date called for redemption. The interest on this bond is payable annually on the first day of January in each year, unless paid previous thereto, and as expressed by the interest coupons hereto attached, which bear the facsimile signatures of the Mayor and Clerk. This bond is payable from the collection of a special tax or assessment, which is a lien against the real estate within said improvement district, as described in said resolution hereinbefore referred to. This bond is redeemable at the option of the city at any time there are funds to the credit of said Special Improvement District No. 12 Fund,

for the redemption thereof, and in the manner provided for the redemption of the same, and is due and payable not later than January 1, 1929." That is to say, the bond bears interest at 6% from date of registration until the date called for redemption. This language would seem [87] to indicate that the bonds are to bear interest at 6% until the date called for redemption, whether before or after maturity; it appears that the unpaid bonds in question are still drawing interest at 6% according to contract, since they have never been called for redemption and paid. It is true that some of the bonds in these suits were called for redemption some time after maturity, but it does not appear to have been a bona fide call, for the bonds were not redeemed. Such a notification to the bondholders amounted to nothing at all, and certainly was not the call for redemption intended by the language of the bond. It most assuredly was not intended that the obligor could call the bonds, refuse payment and thereby stop the running of interest. The case cited by counsel for the city, to wit: *Meyer v. City and County of San Francisco*, 88 Pac. 722, relates to a bond containing a different wording; there the levy made for the payment of interest was to be applied only to the payment of the interest coupons, clearly indicating that no tax was to be levied except for interest represented by the interest coupons attached to the bond, and therefore could not be levied for interest after maturity; here

the intent seems to be to pay interest until the bonds are paid, or called for redemption, as expressed therein. But, of course, the interest would have to come from the particular fund mentioned, and would be according to the rate fixed by contract.

From the master's reports, the arguments of counsel and the evidence, the court does not feel justified in adopting the totals of receipt and disbursements urged by counsel for the city. Except as herein modified the reports of the Special Master are hereby approved as submitted to the court.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed May 2, 1933. [88]

Thereafter, on January 10, 1939, an Order to Show Cause why cause should not be dismissed, was duly filed and entered herein, being in the words and figures following, towit: [89]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

It is ordered and this does order that the parties plaintiff and defendant herein be and appear before the court at the courtroom thereof in the Federal Building at Havre, Montana at the hour of ten o'clock in the morning on January 21, 1939, to

show cause, if any they have, why this action should not be dismissed.

Done in open court at Helena, Montana, January 10, 1939.

JAMES H. BALDWIN

United States District Judge,
District of Montana.

[Endorsed]: Filed and entered Jan. 10, 1939. [90]

Thereafter, on January 21, 1939,

ANSWER TO ORDER TO SHOW CAUSE

was duly filed herein, being in the words and figures following, towit: [91]

[Title of District Court and Cause.]

Now comes Robert N. Erskine and shows to the court that he is the attorney for certain of the defendants in the above causes, being holders of bonds of the City of Wolfe Point, and for and in behalf of whom he now acts; that he has been advised by telegram from the Honorable Arlie M. Foor as attorney for plaintiff in the above causes that an order has been entered to show cause why said causes should not be dismissed. Defendant bondholders object to any dismissal of said proceedings and ask for the entry of a final decree therein and now submit to the court the following reasons:

It is represented to the court that upon the filing of the Master's Report in said causes exceptions

were filed thereto by the defendant City of Wolf Point. Thereafter arguments were heard in open court upon such exceptions and briefs were filed by all parties, and said causes were taken under advisement by the court. In due course a decision was announced by the court substantially sustaining and approving all of the findings of the Master's Report with perhaps minor exceptions.

Within a few days after the decision of the court was announced the [92] undersigned in behalf of all bondholder parties prepared a draft of Findings of Fact and Conclusions of Law whereby the court would adopt as its own the findings and conclusions contained in the Master's Report. Such instrument was thereupon submitted to the attorneys for the City of Wolf Point with a letter commenting upon Sections 70½ and 71 of the Equity Rules of the United States Court with the suggestion that it would simplify the record of said causes if the parties would stipulate that the court might so adopt the findings and conclusions of the Master's Report as constituting the findings and conclusions of the court thereby avoiding the preparation and filing of lengthy findings of fact and conclusions of law substantially the same as contained in the Master's Report. In the answer to such suggestion the attorneys for said city declared that they preferred specific findings and conclusions.

Thereafter there was prepared at considerable length and there was submitted to the attorneys for the City of Wolf Point as to each of the above

cases (1) Findings of Fact and Conclusions of Law; and (2) a Decree. Copies of the foregoing were also submitted to Mr. Arlie M. Foor as attorney for complainants with original copies which he was requested to present to the court. The undersigned is advised that the attorneys for the city thereupon immediately made the request to Mr. Foor that the presentation of such documents to the court should be delayed until the attorneys for the city had sufficient time for a careful examination thereof. Thereafter it was suggested that there were objections to the documents so submitted, that a personal conference for the settlement of such objections seemed advisable, and that such conference might be delayed until such time as the undersigned, who was a resident and practicing attorney of Chicago, Illinois, might make a trip to Montana in connection with certain other litigation also pending in this court.

The undersigned further says that despite the great lapse of time the attorneys for the city have never indicated their objections either to the said Findings of Fact and said Conclusions of Law or to the said Decrees as to either of the above cases and they have not at any time requested the presentation thereof to the court. Neither have the attorneys for the city prepared and submitted any alternate form of decree. These causes have been heard by the court and de- [93] cisions of the court have been announced, and no further action is necessary

therein except the actual filing of decrees together with findings of fact and conclusions of law in accordance with the rules of this court.

Wherefore, in behalf of bondholder parties to said proceedings it is urged that said cases should not be dismissed, but that the court shall act upon and duly file and enter of record in proper form, pursuant to the rules of this court, (1) Findings of Fact and Conclusions of Law, and (2) Decrees.

ROBERT N. ERSKINE

Attorney for Defendant

Bondholders.

State of Illinois

County of Cook—ss.

Robert N. Erskine, being first duly sworn, deposes and says that he has read the above and foregoing answer subscribed by him and that the same is true and correct.

ROBERT N. ERSKINE

Subscribed and sworn to before me this 18th day of January, A.D. 1939.

[Seal] EVELYN HOLSTE

Notary Public.

[Endorsed]: Filed Jan. 21, 1939. [94]

Thereafter, on January 21, 1939, the Order to Show Cause, answer thereto, and objections to dismissal, were duly submitted to the court, the record

of the hearing thereof being in the words and figures following, towit: [95]

In the District Court of the United States in and for the District of Montana. At Havre.

At a stated term, to wit, the January Term, A. D., 1939 of The District Court of the United States and *and* for the District of Montana, begun and held at the court room of said court in the Federal Building at the City of Havre, Montana, on Saturday at 10 A. M. on January 21, 1939, pursuant to statute and the order of the said Court.

Present: Honorable James H. Baldwin, United States District Judge, for the District of Montana.

Thereupon the following proceedings were had and done:

No. 1583, The Hanchett Bond Co. vs. City of Wolf Point, et al.

This cause was duly called for hearing this day on the order to show cause why the case should not be dismissed for want of prosecution. Thereupon Mr. Foor, of the firm of Marron & Foor, counsel for the plaintiff, filed and presented an answer to the order to show cause and objections to the dismissal of the case, and the matter was submitted to the court and taken under advisement. Mr. Foor was granted leave to submit proposed findings of fact and conclusions in connection with

the request therefor contained in said answer to order to show cause.

C. R. GARLOW,
Clerk. [96]

Thereafter, on February 10, 1939, Proposed Findings of Fact and Conclusions of Law were lodged with the Clerk of this Court, and are in the words and figures following, towit: [97]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause now coming on to be heard before the Court upon the report and recommendations of the Special Master in Chancery heretofore appointed by this Court, together with the transcript of evidence submitted therewith, and the Court having examined the pleadings herein and all amendments thereto, and such report with recommendations and the transcript of evidence, and having examined briefs filed herein and heard the arguments of counsel and being fully advised.

Now, therefore, the Court makes and declares its findings of fact upon the record herein, as follows:

1. That the Carnegie National Bank, a corporation of the City of Carnegie, Pennsylvania, has succeeded to the rights of The Hanchett Bond Company as complainant herein, and is now the owner of bonds numbered 45 to 58 inclusive, and

also bond #75, issued by the City of Wolf Point, defendant herein, for Improvement District No. 12 of said City, and that there is now due and owing to said Carnegie National Bank, the face value of said bonds in the amount of \$7,500.00, together with interest thereon at 6% per annum from [98] January 1, 1929.

2. That Minnie Luebbe, as complainant herein, and as successor to A. W. Schreiber, originally named as defendant herein, is now the owner of bonds numbered 42, 43, and 44 issued by the defendant City of Wolf Point for Improvement District No. 12, and that there is now due and owing to said Minnie Luebbe, the face value of said bonds in the amount of \$1,500.00, together with interest thereon at 6% per annum from January 1, 1929.

3. That Payne Avenue State Bank, of the City of St. Paul, Minnesota a defendant herein, is the owner of bonds numbered 59 to 66 inclusive, and that there is now due and owing to said Payne Avenue State Bank, the face value of said bonds in the amount of \$4,000.00, together with interest thereon at 6% per annum from January 1, 1929.

4. That James G. Gleassner, of York, Pennsylvania, a defendant herein, is the owner of bonds numbered 67 and 74, and that there is now due and owing to said James G. Gleassner, the face value of said bonds in the amount of \$1,000.00, together with interest thereon at 6% per annum from January 1, 1929.

5. That the Fulton County Bank of McConnellsburg, Pennsylvania, a defendant herein, is the owner of bonds numbered 68 to 72 inclusive, and that there is now due and owing to said Fulton County Bank, the face value of said bonds in the amount of \$2,500.00, together with interest thereon at 6% per annum from January 1, 1929.

6. That Dr. Louis D. Hyde, of Owedo, New York, a defendant herein, is the owner of bond #73, and that there is now due and owing to said Dr. Louis D. Hyde, the face value of said bond in the amount of \$500.00, together with interest thereon at 6% per annum from January 1, 1929.

7. That the moneys derived from special assessments levied upon the property of Improvement District No. 12 were, by the city ordinance creating the district, irrevocably pledged to the payment of the bonds of said district and the said bonds were payable only from the proceeds of said special assessments.

8. That the bonds numbered 42 to 75 inclusive, owned as aforesaid, and of the aggregate face value of \$17,000.00, constitute all of the bonds of [99] Improvement District No. 12 of said City now outstanding.

9. That the City of Wolf Point, a municipal corporation of the State of Montana, by proceedings under the law of Montana, organized Improvement District No. 12 for the purpose of construction of

a sewer and to defray the cost of such construction work levied a special assessment against the property within said district constituting about four hundred lots, which assessments were made payable in ten annual installments in the years 1919 to 1928 inclusive, with interest payable annually at 6%; that said assessments were levied in the gross amount of \$38,011.20, and the said City of Wolf Point issued seventy-five (75) bonds of the denomination of \$500.00 each, numbered 1 to 75 inclusive, and one bond for \$466.53 numbered 76, which bonds were issued to anticipate the collection of the said special assessments and were payable from the proceeds thereof and by the terms thereof and under the Statutes of Montana were redeemable at the option of the City at any time when there were funds available from the proceeds of the collection of said special assessments, and interest was made payable on said bonds at 6% per annum until the time when any such bonds should be redeemed; that the City of Wolf Point has, prior to the filing of this suit, redeemed bonds numbered 1 to 41 inclusive and 76 in the aggregate amount of \$20,966.33, and said City has also paid interest on all bonds from time to time remaining outstanding and until January 1, 1929, and that the total amount of interest so paid amounted to \$16,874.58.

10. That under the statutes of the State of Montana, such bonds are payable only when called for redemption after moneys are available for that pur-

pose, and they can have no fixed date of maturity, and, therefore, the bonds here in question continue to draw interest at 6% per annum without regard to the fixed date of maturity named in said bonds to-wit, January 1, 1929, but any and all such interest is payable only from the proceeds of collection of the said special assessments.

11. That the City of Wolf Point has established and maintained in accordance with the requirements of the laws of the State of Montana, a fund known as Special Improvement District No. 12 Fund to which there have been credited certain proceeds of collection of the said special assessments and [100] against which there have been debited the bonds and coupons which have been paid.

12. That the City of Wolf Point has collected and received from the proceeds of the collection of the said special assessments on account of principal and interest thereof, and up to the second day of September, 1930, the total gross sum of \$48,873.15, but that the whole of said amount has not been credited to the said Special Improvement District No. 12 Fund; that the total amount proper to be paid and which has been paid out of said Special Improvement District No. 12 Fund is the sum of \$37,840.91, which amount was paid on account of bonds and interest as aforesaid; and there remained a balance from the collection of said special assessments to be accounted for by the City of Wolf Point, as such Special Improvement Dis-

trict No. 12 Fund, in the amount of \$11,032.24, as of the 2nd day of September, 1930, but the actual amount credited upon the books of said City to said Special Improvement District No. 12 Fund as of said date was much less than said amount, namely, \$6,273.34.

13. That on said date, September 2, 1930, there remained payable to the City of Wolf Point a substantial sum on account of such special assessments not yet collected in cases where tax deeds had not issued, part of which may have been or may hereafter be collected, and also a large part of the purchase price of certain lots sold by the County Treasurer on contract after the issuance of tax deed for such delinquent assessments; and that all such amounts remaining due and unpaid on account of such special assessments for Improvement District No. 12 constitute a credit of said Special Improvement District No. 12 Fund as and when collected.

14. That the said City of Wolf Point diverted from the said Special Improvement District No. 12 Fund, and credited to other funds of said City, the amounts and on the dates as follows:

The sum of \$511.67 on January 23, 1922,

The sum of 40.00 on January 4, 1922,

The sum of 522.55 on Nov. 30, 1931,

The amounts of \$747.00 and \$1,908.32 on
May 31, 1922,

making the aggregate amount of such diversions \$3,729.54, which sum was returned to and credited

on the books of said City to the Special Improvement [101] District No. 12 Fund on May 6, 1929; that interest at the rate of 6% per annum on said amounts, from the dates of the respective diversions to May 6, 1929, amounts to \$1,355.83.

15. That the City of Wolf Point has not accumulated and held any large amount of money at any time which should have been applied to the payment of bonds, except for the amount of the diversions indicated in the preceding paragraph.

16. That the City of Wolf Point used and paid out of the Special Improvement District No. 12 Fund, the sum of \$100.00 on account of an audit made of the books of the City and for which said District No. 12 Fund was never reimbursed, and said audit as to District No. 12 Fund would not have been necessary by the use of adequate records; but the records kept by the officials relating to the collection and disbursements of said assessments were inadequate and it was impossible from such records to determine readily what moneys were turned over to the City of Wolf Point which should have been allocated to the Special Improvement District No. 12 Fund.

17. That the amount of the assessments levied for and against Special Improvement District No. 12 were sufficient if collected in full to pay in full the bonds issued and interest thereon.

18. That the property as to which tax deeds were issued, in numerous cases, appraised at less

than the aggregate of delinquent taxes and special assessments against the lots, and were sold for less than the total amount due.

19. That some assessments levied for the improvement above described became delinquent in 1919 and that each succeeding year numerous assessments became delinquent and remained unpaid, but that tax deeds on such property were not taken on the delinquencies of the year 1919 or delinquencies for succeeding years until the year 1929.

20. That the City Treasurer, when an assessment became delinquent, took no action to declare all subsequent assessments immediately due and payable.

21. That subsequent to the passage of Chapter 96 of the Laws of 1923 of the State of Montana, the assessments were collected in two installments [102] although at the time the bonds were issued the assessments became delinquent if not paid in November.

22. That the City of Wolf Point and its collecting agents permitted lots to be subdivided subsequent to the imposition of the assessment and permitted and accepted the payment of partial assessments applicable to a part of the subdivided lots leaving the assessment as to the remainder of such lots delinquent and unpaid.

23. That the City of Wolf Point through the county officials failed to collect penalty and/or interest in some cases where the Installments had

become delinquent even though penalty had not been removed by legislative enactments, and the Special Improvement District No. 12 Fund has not been credited with the amount of such penalty and/or interest.

24. That assessments were delinquent on a number of lots for more than thirty-six months prior to the institution of pending proceedings as to which lots the City of Wolf Point and its collecting agents has not applied for any tax deeds.

25. That by reason of the number of lots that had gone to tax deed, and the amount for which many of the lots have been resold, it does not appear that sufficient will be realized to the credit of the Special Improvement District No. 12 Fund from the proportionate part of the purchase price of the lots sold or from delinquencies in cases where deeds have not issued, to ever discharge the bond issue in full.

26. That at the time of the hearing in this cause there remained a substantial sum due to said Special Improvement District No. 12 from and on account of delinquent assessments in cases where tax deeds had not issued, part of which may have been or may hereafter be collected, and from and on account of a balance due on the purchase price of lots sold on contract after the issuance of tax deed, a proportionate amount of which balance will be payable to said District No. 12 Fund.

27. That the holders of bonds made no demand on the City of Wolf Point for a return of the moneys hereinbefore found to have been diverted and made no protest and initiated no action on account of any of the matters and [103] things relating to the collection and enforcement of assessments hereinbefore found to be true, until the filing of this suit.

28. That the City of Wolf Point issued seventy-six bonds payable from said Special Improvement District No. 12 Fund, of which bonds numbered 1 to 41 inclusive for \$500.00 each, and bond #76 for \$466.33, have been paid in full, making a total payment on account of the principal of such bonds, \$20,966.33, and there are now outstanding and unpaid thirty-four bonds of \$500.00 each, numbered 42 to 75 inclusive in the aggregate amount of \$17,000.00; that interest was paid on all bonds outstanding up to January 1, 1929, but that no interest was paid on any bonds accrued subsequent to said date; that the total amount paid by the City of Wolf Point on account of interest on all such bonds was the sum of \$16,874.58, making the total aggregate payment on account of both bonds and the interest thereon the total sum of \$37,840.91, and that no further or additional disbursements have been made by the City of Wolf Point chargeable to said Special Improvement District No. 12 Fund.

29. That the City of Wolf Point by its Answer

filed in this cause admitted liability for and tendered to the account of bondholders the sum of \$6,273.34 as constituting the full amount then held to the credit of said Special Improvement District No. 12 Fund, and thereafter at the close of the hearing in this cause said City of Wolf Point tendered in open court the sum of \$6,710.39; and thereafter pursuant to the Order of this Court entered by agreement of all parties said City of Wolf Point paid to the several bondholders, parties to this suit, in pro rata proportion upon all bonds a payment of 27% of the face amount of such bonds, being the total sum of \$4,590.00, which sum should be credited against the amount herein found to be the balance to be accounted for by the City of Wolf Point as such Special Improvement District No. 12 Fund in the amount of \$11,032.24 as of the second day of September, 1930.

30. That the moneys derived from the special assessments here in question were by the City Ordinance creating said District No. 12 irrevocably pledged to the payment of the bonds issued on account thereof and all such moneys should be accounted for and should be used only for the purpose of retiring the bonds issued for such improvement with the interest thereon. [104]

31. That the City of Wolf Point collected and paid bonds in numerical order prior to the date of maturity shown on said bonds and prior to the date of collection of the last installment of said assess-

ment, but that no objection was made by any bondholder at any time to such payment.

32. That after said date of maturity of said bonds and of the final installment of said assessment all funds then remaining in said Special Improvement District No. 12 Fund should be distributed and paid in equal pro rata proportion upon all bonds then remaining outstanding and unpaid.

33. That bondholders have suffered no loss by reason of the acts or omissions of the City in failing to actively and with diligence endeavor to collect the assessments levied for and against Special Improvement District No. 12.

34. That the Master by his report has made full and sufficient findings upon all questions of fact; that the findings of fact contained in said report are complete and in accordance with the evidence; and that such findings of fact should be and are hereby approved and confirmed.

35. That complainant and other bondholders are entitled to their costs heretofore advanced and paid in this cause; that it appearing that the defendant city has heretofore paid to the Special Master in Chancery the full amount of his expenses and compensation as approved and allowed by the Court herein, therefore no further allowance is now made in favor of complainant and against the defendant city on account thereof; that it further appearing that said bondholders and the defendant city have heretofore paid in equal proportions between them

the aggregate charges of the court reporter in the total amount of \$528.30 under an agreement that five-sixths thereof be apportioned and assessed in this case, and one-sixth in case No. 1887 pending in this Court and tried upon a joint record herewith, therefore it is found that there be now assessed to and paid by the defendant city as a part of the costs in this cause the sum of \$220.13 for such charges of the court reporter which amount shall be credited to the Special Improvement District No. 12 Fund under the terms hereof. [105]

CONCLUSIONS OF LAW

And the Court now hereby makes and declares its conclusions of law upon the issues in this cause under the pleadings herein and upon the findings of fact hereinabove set forth, as follows:

(1) That the principal issues of law under the pleadings and facts of this cause are:

(a) Whether bondholders are entitled to an accounting on the part of the City in this case;

(b) Whether, by reason of acts of omission and commission complained of, as to which findings have been made above, it can be said that the City has been negligent and that the bondholders have, as a result, suffered damages, and the City should respond to the extent of the loss suffered; or

(c) Whether, by reason of such acts, the fact that the bonds are payable out of a particular fund can be cast aside and moneys taken

from the general coffers of the city, under process of this Court, with which to discharge the bond issue in full, on the theory that a general liability has resulted.

(2) That equity rule 63 was not applicable in this cause as requiring the defendant city in the first instance to bring in its account in the form of debtor and creditor but the burden was on complainants to take the initiative in this case and to make out a prima facie case, establishing by a preponderance of the evidence the contraverted allegations of the Bill of Complaint.

(3) That the City of Wolf Point has no direct general liability upon the improvement bonds sued upon herein such that a general judgment can be had on the bonds as such, but the improvement bonds of the City of Wolf Point are payable solely from the proceeds of special assessments levied for the purpose.

(4) That the proceeds of collection of the special assessments [106] against which the improvement bonds in question are issued constitute a fund irrevocably dedicated to the payment of said bonds and interest thereon.

(5) That whatever moneys are collected from the special assessments in question constitute trust funds to be used exclusively for the retirement of bonds and interest.

(6) That it is not material or necessary, under the issues and evidence in this cause, to determine

whether the city is a trustee or merely an agent for bondholders, because in either event the special assessment moneys collected for the specific purpose of paying principal and interest of bonds constitute trust funds in the possession of the City and as to such moneys the relationship of debtor and creditor only as between city and bondholder does not exist.

(7) That the relation of debtor and creditor as between City and bondholder may apply to the extent only that recourse is limited to the particular fund actually collected; and if the administration of that fund has been regular, but there is no money in the fund with which to liquidate the bondholder's claim, then the bondholder has no other recourse.

(8) That the suit before the Court constitutes a proceeding in equity by reason of the bonds for the purpose of investigating the administration of the assessment fund rather than a suit on the bonds themselves.

(9) That bondholders have a right to an accounting in equity when the bonds remain unpaid after maturity and the City claims an insufficient amount of money on hand to pay the bonds.

(10) That the City of Wolf Point in the administration of the Special Improvement District No. 12 Fund is a mere conduit for receiving moneys belonging to such fund and passing them on to bondholders; that no part of the funds should be intercepted and all of the moneys received should

be delivered to bondholders, but otherwise and in the collection and administration of the fund the duties of the City are passive and not active; that this case involves a local question and the laws of the State of Montana constitute the rule of decision upon such local question as stated by the Supreme Court of Montana in the case of Gagnon v. The City of Butte, 75 Mont. page 279. [107]

(11) That where the City has diverted and used money belonging to the Special Improvement District No. 12 Fund, thereby benefitting general tax buyers through the use of such money and damaging bondholders to the extent of interest at the rate provided for in the bond, the City of Wolf Point should be required to pay interest upon the funds diverted at the rate of 6% per annum from the date of the diversion until the repayment thereof to the Special Improvement District No. 12 Fund, and said City is liable for the amount of such interest.

(12) That the City of Wolf Point is liable for the amount of moneys that the City has collected and received belonging to and collected for Special Improvement District No. 12, less the amount actually dispersed in payment of bonds and the interest accrued on the bonds.

(13) That after the maturity of bonds when funds are not available for payment of bonds in full then all moneys as trust funds should be prorated upon and among all outstanding bonds.

(14) That when the bonds did not mature until

the first day of January, 1929 and interest was paid to that date, there was no laches on the part of bondholders in the bringing of this suit and the claim of bondholders is not barred by any statutes of limitations.

(15) That the City of Wolf Point was not put on notice and had no obligation to prorate the moneys collected upon all outstanding bonds by reason of the delinquency in the payment of assessments beginning in the year 1919, when bondholders made no complaint to the city as to the method of paying bonds in numerical order, but acquiesced therein.

(16) That interest on the bonds here in question is payable at the rate named in the bonds, to-wit, 6% per annum, until the bonds shall be properly called for redemption without regard to any expressed date of maturity, but such interest is payable only from the proceeds of the special assessments belonging to the Special Improvement District No. 12 Fund.

(17) That all moneys collected and received on account of the special assessments levied for Special Improvement District No. 12 Fund subsequent to the accounting herein, belong to the Special Improvement District No. [108] 12 Fund and are applicable to and should be prorated upon all outstanding bonds.

(18) That the City of Wolf Point had no duties to perform and has no obligation to bondholders,

because of its acts or failures to act in the following particulars: (a) That property was sold for less than the amount of accumulated taxes and special assessments after tax deeds had been taken thereon; (b) that properties remained delinquent in the payment of assessments from the year 1919 and until the year 1929 without tax deed being taken thereon; (c) that the City Treasurer took no action to declare assessments due and payable after delinquency; (d) that assessments for the years 1924 and thereafter were collected in two installments; (e) that property was subdivided and payment of partial assessments permitted; (f) that penalties and interest were not collected in full when due; (g) that properties still remain delinquent with no tax deeds taken thereon; (h) that by reason of the failure to collect in full, the total of all present delinquent assessments is not sufficient, if collected in full, to pay the outstanding bonds and interest.

(19) That the conclusions of law upon the issues before the Court under the pleadings herein as made by the Master in his report are correct and are now hereby expressly approved and confirmed except only that conclusion which holds that the bondholders are entitled to interest upon their bonds after the expressed date of maturity thereof at the legal rate of 8% per annum, it being now expressly held that interest is payable upon said bonds only at the rate specified therein.

Therefore, it is ordered that the foregoing are

now hereby adopted, filed and entered of record by this Court as its findings of fact and conclusions of law thereon in this cause.

Enter:

Judge.

[Endorsed]: Lodged in Clerk's office Feb. 10, 1939. [109]

Thereafter, proposed Decree was lodged with the Clerk of this court, being in the words and figures following, to wit: [110]

[Title of District Court and Cause.]

DECREE

This cause came on to be heard at this term upon the findings of fact and conclusions of law made and filed by the Court herein, and was argued by counsel; and thereupon, upon consideration thereof,

It is ordered, adjudged and decreed:

(1) That the City of Wolf Point, Montana, shall maintain a trust fund to be known as Special Improvement District No. 12 Fund, and shall credit to and pay into the said fund the entire proceeds of the collection of a certain special assessment levied against the property lying within and known as Improvement District No. 12 of the said City, and shall proceed hereafter according to law to collect the said special assessment, and shall imme-

diately restore to the said fund the sums hereinafter specifically set out.

(2) That the City of Wolf Point, Montana, pursuant to the accounting herein and the findings of fact made by the Court, shall forthwith account for, make restitution to and pay into said Special Improvement District No. 12 Fund the sum of \$4,758.90, which amount shall be in addition to the sum of \$6,273.34 previously credited upon the books of said City so that said Fund [111] shall be in the amount of \$11,032.24 as of September 2, 1930, subject only to a credit for the sum of \$4,590.00 heretofore distributed and paid under order of this Court, and judgment is so entered; and the said amount necessary to make such restitution and payment shall be paid out of general taxes to be levied for the purpose or out of any other funds that may be available.

(3) That the City of Wolf Point, Montana, shall forthwith pay into said Special Improvement District No. 12 Fund the further sum of \$1,355.83, and judgment is so entered, representing interest upon moneys diverted, pursuant to the accounting herein and the findings of fact made by the Court; and the said amount necessary to make such payment shall be paid out of general taxes to be levied for the purpose or out of any other funds that may be available.

(4) That the City of Wolf Point, Montana, shall forthwith pay into said Special Improvement Dis-

trict No. 12 Fund the further sum of \$100.00, and judgment is so entered, representing the amount diverted from said Fund to pay the cost of an audit pursuant to the accounting herein and the findings of fact made by the Court; and the said amount necessary to make such payment shall be paid out of general taxes to be levied for the purpose or out of any other funds that may be available.

(5) That the City of Wolf Point, Montana, shall forthwith and hereafter account for as a part of and pay into said Special Improvement District No. 12 Fund all moneys which have been collected or which may be collected subsequent to September 2, 1930, as the proceeds of the special assessment levied against the property within and known as Improvement District No. 12 of said City; and all moneys so collected since September 2, 1930, or hereafter so collected, shall be credited to and held as a part of said Special Improvement District No. 12 Fund.

(6) That there is due and owing to the bondholder parties to this cause payable by the City of Wolf Point, Montana, together with interest at 6% per annum from January 1, 1929, but solely and only out of the Special Improvement District No. 12 Fund under the terms hereof, the amounts as follows: [112]

To Carnegie National Bank.....	\$7500.00
To Minnie Luebbe.....	1500.00
To Payne Avenue State Bank.....	4000.00

To James G. Gleassner.....	1000.00
To Fulton County Bank.....	2500.00
To Dr. Louis D. Hyde.....	500.00

And judgment is hereby entered accordingly in favor of said parties as upon the bonds of said City issued for Improvement District No. 12 respectively held by each of said parties.

(7) That the parties hereto and hereafter named are the sole and only persons who have any claim to or rights in the Special Improvement District No. 12 Fund of the City of Wolf Point, Montana, and that said Fund and all moneys constituting a part thereof at any time under the terms hereof shall be apportioned between and paid to said parties, according to their respective holdings of bonds as found by the Court until payment thereof in full, as follows:

To Carnegie National Bank.....	75/170ths of said Fund
To Minnie Luebbe.....	15/170ths of said Fund
To Payne Avenue State Bank.....	40/170ths of said Fund
To James G. Gleassner.....	10/170ths of said Fund
To Fulton County Bank.....	25/170ths of said Fund
To Dr. Louis D. Hyde.....	5/170ths of said Fund

(8) That the said City of Wolf Point, Montana, forthwith pay out to the said bondholders in the proportions above set out all moneys in the said Special Improvement District No. 12 Fund, and shall from time to time thereafter whenever there is money in the said Fund forthwith pay and distribute the same to said bondholders in the proportions above set out.

(9) That the said bonds of the City of Wolf Point, Montana, issued for Improvement District No. 12 shall be deposited with and held by the Clerk of this Court, and shall be cancelled and delivered by said Clerk to the Treasurer of the City of Wolf Point, Montana, upon payment thereof in full or when said Special Improvement District No. 12 Fund shall be exhausted after collection in full of the said special assessment levied against the property within and known as Improvement District No. 12 of said City.

(10) That judgment be and is hereby entered against the City of Wolf Point, Montana, for the costs of these proceedings, pursuant to the Findings [113] and Conclusions of this Court, and the amount thereof shall be credited to and become a part of said Special Improvement District No. 12 Fund to be paid out under the terms hereof.

(11) That the Court now expressly reserves jurisdiction of this cause for the purpose of the further administration of said Special Improvement District No. 12 Fund and the enforcement of the terms of this judgment and decree.

Enter:

.....
Judge [114]

Thereafter, on February 10, 1939, Order of Dismissal was duly filed and entered herein, being in the words and figures following, to wit: [115]

District Court of the United States
District of Montana, Havre Division

No. 1583

CARNEGIE NATIONAL BANK, Successor to
THE HANCHETT BOND COMPANY, a corporation, and MINNIE LUEBBE,
Complainants,

vs. •

CITY OF WOLF POINT, State of Montana, a Municipal Corporation; PAYNE AVENUE STATE BANK OF ST. PAUL, MINNESOTA, a corporation; JAMES G. GIEASSNER; FULTON COUNTY BANK OF McCONNELSBURG, PA., a corporation, and DR. LOUIS D. HYDE,

Defendants.

ORDER OF DISMISSAL

Good cause not having been shown, as directed by this Court by its order of January 10, 1939, why the parties plaintiff and defendant failed to take any forward step herein for nearly six years,—that is to say from May 2, 1933 to January 10, 1939, it is ordered, and this does order, that the above-entitled action be and the same is hereby dismissed.

Done in open court at Havre, Montana, February 10, 1939.

JAMES H. BALDWIN

United States District Judge
District of Montana

[Endorsed]: Filed and entered February 10, 1939.

[116]

Thereafter, on April 20, 1939, Affidavit of Arlie M. Foor was filed herein, being in the words and figures following, to wit: [117]

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Roosevelt—ss.

Arlie M. Foor, being first duly sworn upon oath, deposes and says:

That I am a duly licensed and practicing attorney in the State of Montana and duly admitted to practice law in the Federal Courts of said state.

That James H. Baldwin, United States District Judge, issued an order to show cause upon his own motion in the above entitled action that the parties, Plaintiff and Defendant appear before the court in the Federal Building at Havre, Montana at the hour of 10 o'clock in the morning on January 21, 1939 to show cause if any they have, why the said action should not be dismissed.

At the time and place set forth in said order I

personally appeared before the court in response to the ruling to show cause and objected in behalf of the Plaintiffs to dismissal of the suit for the reason that the same involved the collection of special improvement district taxes, that taxes were being paid into the fund from time to time which would be necessary for the court to make an order of distribution among the various bondholders; that the continuance of the said action was agreeable [118] to all of the Plaintiffs and Defendants. I further expressed to the court that these cases were being carried on by the parties for the reason that Robert N. Erskine, Attorney at Law, residing and practicing in the city of Chicago and representing some of the Defendants, contemplated on making a personal trip to Montana for the express purpose of working out a satisfactory solution, if possible, of the Masters decision in this case No. 1583. If and when that was done, the other three cases which involved the collection and distribution of special improvement district taxes would be considered.

No opportunity to proceed in this matter was given by the court, although the actions were pending in the Federal Court at Great Falls and had been theretofore handled by District Judge Charles N. Pray, who, so far as I know, had no objection to their pending in his court, none having ever been made by the Judge.

There are large sums of money in the city treasuries for distribution among the bond holders and

the dismissal of these actions will be detrimental to their interests.

ARLIE M. FOOR

Subscribed and sworn to before me this 18th day of April, A. D. 1939.

[U. S. Comr. Seal] CHARLES GORDON

United States Commissioner for
the State of Montana

Residing at Wolf Point, Montana.

My commission expires Feb. 1, 1943.

[Endorsed]: Filed April 20, 1939. [119]



Thereafter, on May 10, 1939, Notice of Appeal by Carnegie National Bank, was duly filed herein, being in the words and figures following, to wit:

[120]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that Carnegie National Bank, a plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order dismissing the above entitled case for want of prosecution entered in this action on February 10, 1939.

CARNEGIE NATIONAL BANK

Signed: ARLIE M. FOOR

Attorney for Appellant Carnegie
National Bank

Address: Wolf Point, Montana.

[Endorsed]: Filed May 10, 1939. [121]

Thereafter, on May 10, 1939,

BOND ON APPEAL

was duly filed herein by Carnegie National Bank, being in the words and figures as follows, to wit:

[122]

Bond No. 1692736

Know all men by these presents:

That we, Carnegie National Bank, as principal, and Hartford Accident & Indemnity Company, as surety, are held and firmly bound unto City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, James G. Gleassner, Fulton County Bank of McConnellsburg, Pa., a corporation, and Dr. Louis D. Hyde, or either of them, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said City of Wolf Point, State of Montana, a Municipal corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, James G. Gleassner, Fulton County Bank of McConnellsburg, Pa., a corporation and Dr. Louis D. Hyde, or either of them, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 5th day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Whereas, lately at a session of the District Court of the United States for the State of Montana in a suit pending in said Court, designated as No. 1583, between Carnegie National Bank, Successor to The Hanchett Bond Company, a corporation, and Minnie Luebbe, plaintiffs, and City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, James G. Gleassner, Fulton County Bank of McConnellsburg, Pa., a corporation, and Dr. Louis D. Hyde, defendants, an order was entered dismissing the said cause for want of prosecution, and the said Carnegie National Bank having filed with the said District Court a notice of appeal as provided by the Rules of Civil Procedure for the District Courts of the United States.

Now, the condition of the above obligation is such, that if the said Carnegie National Bank shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, or if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise to remain in full force and effect.

[Seal] CARNEGIE NATIONAL BANK

[Seal] FRANK ROME

President

[Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY

By JOHN KAHL,
Attorney-in-Fact

[Seal] HARTFORD ACCIDENT AND
 INDEMNITY COMPANY

By C. R. LOWERY,
Attorney-in-Fact

Attest:

T. Z. DEZKUS
Secretary [123]

Hartford Accident and Indemnity Company
Hartford, Connecticut

POWER OF ATTORNEY

Know all men by these presents, that Hartford Accident and Indemnity Company, a corporation, duly organized under the laws of the State of Connecticut, and having its principal office in the city of Hartford, County of Hartford, State of Connecticut, does hereby make, constitute and appoint George H. Moloney, William H. Wallace, John C. Hyde, Frank J. Soukup, Sol Salins, Ward H. Hilton, Larned V. Eklund, Luman E. Williams, Lloyd E. Beach and/or John Kahl of Chicago, Illinois, its true and lawful Attorneys-in-fact, with full power and authority to each of said Attorneys-in-fact to sign, execute and acknowledge any and all bonds and undertakings on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance

contracts where surety bonds are accepted by states or municipalities, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed, and to bind Hartford Accident and Indemnity Company thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an executive officer of Hartford Accident and Indemnity Company and sealed and attested by one other of such officers, and hereby ratifies and confirms all that its said Attorneys-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following By-Law adopted by the Board of Directors of Hartford Accident and Indemnity Company at a meeting duly called and held on the 2nd day of June, 1914:

Article XIII (A)

Section 2. The Executive Officers of the Company shall have power and authority to appoint for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such [124] Resident Vice-President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given him.

Section 5. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such officers.

In witness whereof, Hartford Accident and Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 16th day of June, 1938.

[Corporate Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY

(Signed) WALLACE STEVENS

Vice-President

Attest:

(Signed) J. O. LUMMIS

Assistant Secretary

State of Conecticut,
County of Hartford—ss.

On this 16th day of June, A. D. 1938, before me personally came Wallace Stevens, to me known, who being by me duly sworn, did depose and say: that

he resides in the City of Hartford, State of Connecticut; that he is the Vice-President of Hartford Accident and Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Notarial Seal] (Signed) A. P. WHALEN

Notary Public

My commission expires Feb. 1, 1941. [125]

State of Connecticut,
County of Hartford—ss.

CERTIFICATE

I, the undersigned, Assistant Secretary of the Hartford Accident and Indemnity Company, a Connecticut Corporation, Do hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore, that Article XIII (A), Sections 2 and 5, of the By-Laws of the Company, set forth in the Power of Attorney, is now in force.

Given under my hand and the seal of the company, at the City of Hartford, on April 17th, 1939.

[Seal]

J. J. MANDLEY,

Assistant Secretary.

State of Illinois,
County of Cook—ss.

On this 17th day of April, 1939, before me, a notary public, within and for said County and State, personally appeared John Kahl, to me personally known, who being duly sworn, upon oath did say that he is the Attorney In Fact of and for the Hartford Accident and Indemnity Company, a corporation of Hartford, Connecticut, created, organized and existing under and by virtue of the laws of the State of Connecticut; that the corporate seal affixed to the foregoing within instrument is the seal of the said company; that the seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said John Kahl did acknowledge that he executed the said instrument as the free act and deed of said company.

[Seal] DAVID R. SLAUGHTER,
Notary Public, Cook County.

[Enorsed]: Filed May 10, 1939. [126]

Thereafter, on June 9, 1939, Order substituting Hazel Graham Glessner, as Executrix, etc., for James G. Glessner, was filed and entered herein being in the words and figures following, to wit: [127]

[Title of District Court and Cause.]

ORDER

Upon written motion of Hazel Graham Glessner suggesting the death of James G. Glessner, one of the defendants herein, and asking to be substituted,

It Is Ordered that the death of the defendant James G. Glessner, be noted upon the records and that Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, be substituted for the said James G. Glessner as a defendant in the above entitled proceedings.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed and Entered June 9, 1939.

[128]



Thereafter on May 10, 1939, Notice of Appeal of Hazel Graham Glessner, as Executrix, etc., was duly filed herein, being in the words and figures following towit: [129]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, a defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order dismissing the above

entitled case for want of prosecution entered in this action on February 10, 1939.

HAZEL GRAHAM GLESSNER,
Executrix of Estate of James
G. Glessner, Dec'd.

Signed: CHARLES GORDON,
Address: Wolf Point,
Montana.

Signed: ROBERT N. ERSKINE,
Address: Chicago, Illinois.

Attorneys for Appellant Hazel Graham Glessner,
as Executrix of the Estate of James G. Gless-
ner, Deceased.

[Endorsed]: Filed May 10, 1939. [130]

Thereafter, on May 10, 1939,

BOND ON APPEAL,

of Hazel Graham Glessner, as Executrix, etc., was
duly filed herein, being in the words and figures
following, towit: [131]

Bond No. 1692737

Know All Men By These Presents:

That we, Hazel Graham Glessner, as Executrix
of the Estate of James G. Glessner, Deceased, as
principal, and Hartford Accident & Indemnity
Company, as surety, are held and firmly bound
unto City of Wolf Point, State of Montana, a
municipal corporation, and to each and all of the
several other parties, jointly and severally, to those

certain proceedings hereafter designated, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said City of Wolf Point, State of Montana, a municipal corporation, or to any or all of said parties to said proceedings, jointly or severally, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 5th day of May in the year of our Lord one thousand nine hundred and thirty-nine.

Whereas, lately at a session of the District Court of the United States for the State of Montana in a suit pending in said Court, designated as No. 1583, between Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, and Minnie Luebbe, plaintiffs, and City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a corporation, James G. Gleassner, Fulton County Bank of McConnellsburg, Pa., a corporation, and Dr. Louis D. Hyde, defendants, an order was entered dismissing the said cause for want of prosecution, and the said Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, having filed with the said District Court a notice of appeal as provided by the Rules of Civil Procedure for the District Courts of the United States.

Now, the condition of the above obligation is such,

that if the said Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, shall prosecute her said appeal to effect, and shall answer all damages and costs that may be awarded against her if she fail to make her plea good, or if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise to remain in full force and effect.

HAZEL GRAHAM GLESSNER,
Executrix of Estate of James
G. Glessner, Deceased.

[Seal] By ROBERT N. ERSKINE,
Her Attorney-in-fact.

[Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY,
By JOHN KAHL,
Attorney-in-fact.

[Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY,
By C. R. LOWERY,
Attorney-in-fact. [132]

POWER OF ATTORNEY

Know All Men By These Presents:

That I Hazel Graham Glessner, Executrix of the Estate of James G. Glessner, deceased, late of York, Pa. do hereby appoint Robert N. Erskine of Chicago, Illinois, my attorney and agent for me and in my name to prosecute or enforce or to defend and answer all actions or other legal proceedings

relating to Improvement Bonds issued by the City of Wolf Point, Montana; and particularly to act for me and in my name in those certain proceedings in the United States District Court for the District of Montana presently entitled: Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, et al. vs. The City of Wolf Point, Montana, a municipal corporation, and others, therein pending as Case No. 1583 and in any appeal from such proceedings to the Circuit Court of Appeals to the Ninth Circuit, specifically to include the execution and filing of any notice of appeal, appeal bond with surety, designation of contents or record on appeal, assignment of errors, and any other document required to be signed and filed in such proceedings; and generally to act as my attorney and agent in such proceedings; and to do all such acts and things as fully and effectually in all respects as I my self could do if personally present; and I hereby for myself, my heirs, executors, and administrators, ratify and confirm and agree to ratify and confirm whatsoever my said attorney shall do by virtue of these presents.

In Witness Whereof I have hereunto set my hand and seal this Fifth day of May, A. D. 1939.

[Seal]

HAZEL GRAHAM GLESSNER,
Executrix of the Estate of
James G. Glessner, deceased,
late of York, Pa. [133]

Hartford Accident and Indemnity Company
Hartford, Connecticut

POWER OF ATTORNEY

Know All Men By These Presents, That Hartford Accident and Indemnity Company, a corporation, duly organized under the laws of the State of Connecticut, and having its principal office in the city of Hartford, County of Hartford, State of Connecticut, does hereby make, constitute and appoint George H. Moloney, William H. Wallace, John C. Hyde, Frank J. Soukup, Sol Selins, Ward H. Hilton, Larned V. Eklund, Luman E. Williams, Lloyd E. Beach and/or John Kahl of Chicago, Illinois, its true and lawful Attorneys-in-fact, with full power and authority to each of said Attorneys-in-fact to sign, execute and acknowledge any and all bonds and undertakings on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust; guaranteeing the performance of contracts other than insurance policies; guaranteeing the performance of insurance contracts where surety bonds are accepted by states or municipalities, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed, and to bind Hartford Accident and Indemnity Company thereby as fully and to the same extent as if such bonds and undertakings and other writings obligatory in the nature thereof were signed by an Executive officer of Hartford Accident and Indemnity Company and sealed and at-

tested by one other of such officers, and hereby ratifies and confirms all that its said Attorneys-in-fact may do in pursuance hereof.

This power of attorney is granted under and by authority of the following By-Law adopted by the Board of Directors of Hartford Accident and Indemnity Company at a meeting duly called and held on the 2nd day of June, 1914:

Article XIII (A)

Section 2. The Executive Officers of the Company shall have power and authority to appoint for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, one or more Resident Vice-Presidents, Resident Assistant Secretaries and Attorneys-in-fact and at any time to remove any such [134] Resident Vice-President, Resident Assistant Secretary, or Attorney-in-fact, and revoke the power and authority given him.

Section 5. Attorneys-in-fact shall have power and authority, subject to the terms and limitations of the power of attorney issued to them, to execute and deliver on behalf of the Company and to attach the seal of the Company thereto any and all bonds and undertakings, and other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the Company as if signed by an Executive Officer and sealed and attested by one other of such officers.

In Witness Whereof, Hartford Accident and Indemnity Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 16th day of June, 1938.

[Corporate Seal]

HARTFORD ACCIDENT AND
INDEMNITY COMPANY

(Signed) WALLACE STEVENS,
Vice-President.

Attest:

(Signed) J. O. LUMMIS,
Assistant Secretary.

State of Connecticut,
County of Hartford—ss.

On this 16th day of June, A. D. 1938, before me personally came Wallace Stevens, to me known, who being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Vice-President of Hartford Accident and Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

[Notarial Seal]

(Signed) A. P. WHALEN,
Notary Public.

My commission expires Feb. 1, 1941. [135]

CERTIFICATE.

State of Connecticut,
County of Hartford,—ss.

I, the undersigned, Assistant Secretary of the Hartford Accident and Indemnity Company, a Connecticut Corporation, Do hereby Certify that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore, that Article XIII (A), Sections 2 and 5, of the By-Laws of the Company, set forth in the Power of Attorney, is now in force.

Given under my hand and the seal of the company, at the City of Hartford, on April 17th, 1939.

[Seal]

J. J. MANDLEY

Assistant Secretary

State of Illinois,
County of Cook,—ss.

On this 17th day of April, 1939, before me, a notary public, within and for said County and State, personally appeared John Kahl, to me personally known, who being duly sworn, upon oath did say that he is the Attorney In Fact of and for the Hartford Accident and Indemnity Company, a corporation of Hartford, Connecticut, created, organized and existing under and by virtue of the laws of the State of Connecticut; that the corporate seal affixed to the foregoing within instrument is the seal of the said company; that the seal

was affixed and the said instrument was executed by authority of its Board of Directors; and the said John Kahl did acknowledge that he executed the said instrument as the free act and deed of said company.

[Seal]

DAVID R. SLAUGHTER

Notary Public, Cook County.

[Endorsed]: Filed May 10, 1939. [136]

Thereafter, on June 5, 1939, Designation of Portions of the Record to be contained in the Record on Appeal, was duly filed herein, being in the words and figures following, towit: [137]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD OF APPEAL

Now come Carnegie National Bank and Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, parties to the above proceedings, who have filed herein respectively Notice of Appeal and now hereby designate to the said District Court the following portions of the record and proceedings in the above entitled cause to be contained in the record on appeal to be filed pursuant to such notice, as follows:

1. Amended Bill of Complaint, excluding Exhibits 1 and 2, filed May 22, 1930.

2. Answer of City of Wolf Point, excluding Exhibit A, filed September 2, 1930.
3. Order of November 17, 1930, appointing Special Master.
4. Order of November 17, 1930 for service on absent defendants.
5. Answer of defendants, Payne Avenue State Bank, et al., filed January 12, 1931.
6. Report and recommendations of Special Master filed November 12, 1932.
7. Exceptions of City of Wolf Point to Special Master's Report filed November 25, 1932.
8. Order of December 14, 1932, allowing Special Master's Fees.
9. Exceptions to Master's Report by Complainant filed January 9, 1933.
10. Order of January 10, 1933, substituting Carnegie National Bank as plaintiff.
11. Order of January 10, 1933, vacating default of A. W. Schreiber and substituting Minnie Luebbe in place of A. W. Schreiber.
12. Order of January 10, 1933, to amend answer.
13. Order of January 10, 1933, for payment of certain money to bondholders.
14. Decision on Special Master's Report filed May 2, 1933.
15. Order of January 10, 1939, to show cause.
16. Answer to order to show cause with objec-

tions to dismissal and request for finding filed January 21, 1939.

17. Order of January 21, 1939, case submitted to the court and taken under advisement, counsel to submit proposed findings, etc.

18. Proposed Findings and Conclusions lodged February 10, 1939.

19. Decree lodged February 10, 1939.

20. Order of February 10, 1939, for dismissal of case.

21. Affidavit of Arlie M. Foor, solicitor of complainant.

22. Notice of Appeal of Carnegie National Bank.

23. Appeal Bond of Carnegie National Bank.

24. Order, substituting Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased.

25. Notice of Appeal of Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased.

26. Appeal Bond of Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased.

Wherefore, said appellants pray that the record of the United States District Court for the State of Montana in said cause be prepared accordingly

and filed in the Circuit Court of Appeals for the Ninth Circuit.

CARNEGIE NATIONAL BANK
HAZEL GRAHAM GLESSNER

as Executrix of the Estate of
James G. Glessner

By ARLIE M. FOOR

Attorney for Carnegie National
Bank

ROBERT N. ERSKINE

CHARLES GORDON

Attorneys for Hazel Graham
Glessner as Executrix of the
Estate of James G. Glessner,
Deceased.

[Endorsed]: Filed June 5, 1939 [138]

Thereafter, on July 5, 1939, Motion for Dismissal was duly filed herein, being in the words and figures following, towit: [139]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL.

Comes now the above named defendant, City of Wolf Point, and moves this Honorable Court to Dismiss the above entitled action for want of prosecution pursuant to Rule 48-3 of rules of this court for the reason that no forward step has been taken

in said cause by the Complainant therein for a period of more than one year.

This motion is made upon the files and records in said action.

Dated this 12th day of May, 1934.

FRANK M. CATLIN

H. C. HALL.

E. J. McCABE

Attorneys for Defendant, City
of Wolf Point.

Indorsed on back:

Due service of the within Motion for Dismissal is hereby acknowledged at Wolf Point, Montana, this 14th day of May, 1934.

MARRON & FOOR

By ARLIE M. FOOR,

Attorneys for Complainant.

[Endorsed]: Filed July 5, 1939. [140]

Thereafter, on July 5, 1939, Notice of Hearing on Motion to Dismiss was filed herein, being in the words and figures following, towit: [141]

[Title of District Court and Cause.]

NOTICE OF HEARING.

To the above named plaintiff and to Arlie M. Foor and Robert M. Erskine, its solicitors of record:

You and each of you will please take notice that on the 22nd day of May, 1934, at the hour of ten

o'clock, A. M. of said day or as soon thereafter as counsel may be heard at the Court Room of the above entitled Court at Great Falls, Cascade County, Montana, the defendant, City of Wolf Point, will call up for hearing and determination its motion to dismiss the above cause for want of prosecution, a copy of which said motion is herewith served upon you.

Dated this 12th day of May, 1934.

FRANK M. CATLIN.

H. C. HALL

E. J. McCABE

Attorneys for Defendant, City
of Wolf Point.

Due service of the within notice of hearing is hereby acknowledged at Wolf Point, Montana, this 14th day of May, 1934.

MARRON & FOOR,

By ARLIE M. FOOR,

Attorneys for Complainant.

[Endorsed]: Filed July 5, 1939. [142]

Thereafter, on July 5, 1939, Affidavit of H. C. Hall was duly filed herein, being in the words and figures following, to wit: [143]

[Title of District Court and Cause.]

AFFIDAVIT OF H. C. HALL.

United States of America
State and District of Montana,
County of Cascade.—ss.

H. C. Hall, being first duly sworn, deposes and says:

That at all times since the commencement of the above entitled action he has been and now is one of the attorneys for the defendant, City of Wolf Point, in the above entitled action, and makes this affidavit for and on behalf of said defendant for the reason that he is familiar with the facts and matters hereinafter set forth.

That the report of the special master appointed by the court to hear the evidence was filed and entered in said action on November 12th, 1932. That thereafter, exceptions were filed to such report and on May 2nd, 1933 the decision of the court on such exception matters; report and objections filed thereto was duly made and entered, and notice thereof given to counsel for complainants and defendants. That thereafter no forward step was taken by the complainants for more than a year and on or about the 14th day of May, 1934 counsel for the defendant, City of Wolf Point,

served upon the attorneys for the complaints motion to dismiss said cause for want of prosecution, and noticed said motion for hearing on the 22nd day of May, 1934, all of which appears from the record in said action. That immediately thereafter and upon the urgent telephonic request of one of the attorneys for the complainants, the hearing on said motion to dismiss was continued, and said attorney agreed to take immediate steps to present to the court findings of fact, conclusions of law and proposed decree, it being understood that such presentation would take place not later than sometime during the middle of the month of July, 1934. [144]

That sometime in the month of June, 1934 copies of proposed findings of fact and conclusions of law and decree were received by the attorneys for the defendant, City of Wolf Point, who thereupon immediately advised the attorneys for the complainants that they were dissatisfied therewith, and that the matter could be taken up with the court and the attorneys for complainants in the month of July, 1934, and that hearing upon the motion to dismiss for want of prosecution would be delayed until such conference was had.

That nothing further was done by the attorneys for the complainants with reference to such findings of fact, conclusions of law and decree, either by way of presentment to the court or conference with the attorneys for the defendant until February

10th, 1939, in response to an order issued by the court on January 10th, 1939, to show cause why said action should not be dismissed for want of prosecution. That neither said defendant, city of Wolf Point, nor its attorneys, have at any time agreed or consented to the delay in said action, and have at all times desired that the attorneys for the complainant move promptly in the prosecution of said action.

That attached hereto and by this reference made a part hereof, is a letter from one of the attorneys for the complainants with reference to findings of fact, conclusions of law and proposed decree, received by counsel for the defendant on or about June 6th, 1934.

H. C. HALL

Subscribed and sworn to before me this 5th day of July, 1939.

[Notarial Seal] EDW. C. ALEXANDER
Notary Public for the State of Montana.
Residing at Great Falls, Montana.

My commission expires Sept. 11, 1941.

[Endorsed]: Filed July 5, 1939. [145]

Wolf Point, Montana

June 5th, 1934.

Hall & McCabe,
Attorneys at Law,
Strain Building,
Great Falls, Montana.

In re: Hanchett Bond v. City of Wolf Point, et al.

Attention: Mr. Hall

Dear Sirs:

This will acknowledge receipt of your favor of the 4th inst., regarding a receipt of copy of proposed findings of fact, conclusions of law, and decree in cases 1583 and 1887. Mr. Erskine plans on being in Montana sometime during the middle of July, and if it would be agreeable to you, I am sure it would be advantageous to all parties concerned to wait until that time so that if there are any changes which you desire to make, they could be gone over and agreed upon without contesting the matter before the court. We hope to have the Poplar cases ready for hearing at that time and Mr. Erskine will be here for that purpose. The exact date has not been determined as yet, but he expects to be here a week before they are set for hearing.

Thank you for your many courtesies extended to this office.

MARRON & FOOR

By: FOOR

AMF:m [146]

Thereafter, on July 5, 1939, Designation of Additional Portions of Record to be contained in record on Appeal, was duly filed herein, being in the words and figures following, to wit: [147]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD TO BE CONTAINED IN REC-
ORD ON APPEAL

Comes now the above named defendant, City of Wolf Point, State of Montana, a municipal corporation, and hereby designates to said district court the following additional portions of the record and proceedings in the above entitled cause to be contained in the record on appeal to be filed pursuant to said notice of appeal heretofore filed in said action, to wit:

- (1) Motion for dismissal, dated May 12th, 1934.
- (2) Notice of hearing on motion for dismissal dated May 12th, 1934.
- (3) Affidavit of H. C. Hall, filed July 5th, 1939.

Dated this 5th day of July, 1939.

FRANK M. CATLIN,
Wolf Point, Montana.

HALL & ALEXANDER,
Great Falls, Montana.

Attorneys for defendant,
City of Wolf Point.

[Endorsed]: Filed July 5, 1939. [148]

Thereafter, on June 9, 1939, Order extending time to file record on appeal in Circuit Court of Appeals, was filed and entered herein, said original order being hereto annexed, and is in the words and figures following, to wit: [149]

[Title of District Court and Cause.]

ORDER.

On reading and filing the affidavit of Arlie M. Foor duly verified the 25th day of May, A. D. 1939 and on motion of Arlie M. Foor, Attorney for the Complainants, it is:

Ordered that the time for the complainants to print and docket the case and file the record be, and the same hereby is, extended to and including the 9th day of August 1939, and the term of this court is extended to the 9th day of Aug., 1939.

CHARLES N. PRAY

United States District Judge

[150]

[Endorsed]: Filed and entered June 9, 1939.

[151]

[Title of District Court.]

United States of America

District of Montana—ss.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States

Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 152 pages, numbered consecutively from 1 to 152 inclusive, is a full, true and correct transcript of all matter designated by the parties as the record on appeal in case No. 1583, Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, vs. City of Wolf Point, Montana, et al., as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Thirty-four and 30/100 Dollars, (\$34.30), and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 24th day of July, A. D. 1939.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court

By C. G. KEGEL

Deputy. [152]

[Endorsed]: No. 9248. United States Circuit Court of Appeals for the Ninth Circuit. Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, Appellant, vs. City of Wolf Point, State of Montana, a Municipal Corporation, Payne Avenue State Bank of St. Paul, Minnesota, a Corporation, Hazel Graham Glessner,

as Executrix of the Estate of James G. Glessner, Deceased, Fulton County Bank of McConnellsburg, Pa., a Corporation, and Dr. Louis D. Hyde, Appellees, and Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, Appellant, vs. City of Wolf Point, State of Montana, a Municipal Corporation, Carnegie National Bank, Successor to The Hanchett Bond Company, a Corporation, Payne Avenue State Bank of St. Paul, Minnesota, Fulton County Bank of McConnellsburg, Pa., and Dr. Louis D. Hyde, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the District of Montana.

Filed July 29, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 9248

CARNEGIE NATIONAL BANK, Etc.,
Appellant,

vs.

CITY OF WOLF POINT, Etc., Et al.

STATEMENT OF POINTS RELIED UPON.

Whereas, the District Court by its order of February 10, 1939, dismissed this cause, as for want

of prosecution, and an appeal has been perfected from such order of dismissal,

Now, therefore, the appellants, Carnegie National Bank and Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, now give notice that they intend to rely on this appeal on the following points:

1. The entry of such order of dismissal was erroneous when all parties were in open court, by personal appearance or by written answer, to a rule to show cause, and both the plaintiff and certain of the defendants urged further appropriate proceedings.

2. The entry of such order of dismissal was erroneous upon the state of the record, a full hearing having been had, a decision of the District Court having been announced and the cause being ready for final disposition.

3. The entry of such order of dismissal was erroneous upon the state of the record, a full hearing having been had, a decision of the District Court having been announced and there being presented to the court for adoption and final entry a decree with findings of fact and conclusions of law.

4. The entry of such order of dismissal was erroneous for the reason that the decree together with the findings of fact and conclusions of law presented to the court should have been duly filed and entered of record.

5. The entry of such order of dismissal was erroneous for the reason that this cause was pending before the Honorable Charles N. Pray, one of the judges of the District Court for Montana, by whom all orders in the case had been entered and who had heard exceptions to the Master's report in said cause and filed his memorandum decision thereon, and, therefore, it was improper for another judge of said court to assume jurisdiction, entering a rule to show cause and an order of dismissal.

Wherefore, the appellants pray that said order of dismissal entered in said cause be vacated and set aside and that said cause be returned to the District Court for further proceedings pursuant to the record therein; and your appellants will ever pray.

CARNEGIE NATIONAL BANK
HAZEL GRAHAM GLESSNER,

as Executrix of the Estate of
James G. Glessner, Deceased.

By ARLIE M. FOOR

ROBERT N. ERSKINE

Their Attorneys.

[Endorsed]: Filed Aug. 7, 1939. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED.

Now come Carnegie National Bank and Hazel Graham Glessner, as Executrix of the Estate of James G. Glessner, Deceased, as appellants, by Arlie M. Foor and Robert N. Erskine, their attorneys, and now hereby declare that the entire record as filed in the above court is necessary for the consideration of the questions presented upon this appeal, and such entire record should be printed accordingly.

ARLIE M. FOOR

ROBERT N. ERSKINE

Attorneys for Appellants.

[Endorsed]: Filed Aug. 7, 1939. Paul P. O'Brien,
Clerk.